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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL A. WILKINS,

Petitioner,

v.

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF INDIANA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an attorney's advocacy in an appellate brief challenging an appellate decision as result-based ignoring law and fact is speech protected by the First Amendment against disciplinary charges as rhetorical hyperbole incapable of being proven false by the charger?

2. Whether such advocacy is protected by the First Amendment unless made with actual malice proven by clear and convincing evidence?

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Michael A. Wilkins respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Indiana.

OPINION BELOW

The 3-2 opinion of the Indiana Supreme Court as to which review is sought is reported at 777 N.E.2d 714 (Ind. 2002), reproduced App. A. Subsequently, a Justice recused by an opinion reported at 780 N.E.2d 842 (Ind. 2003), reproduced at App. B. The opinion on rehearing, a 2-2 split on conviction issues and 3-1 decision on punishment, is reported at 782 N.E.2d 985 (Ind. 2003), reproduced at App. C.

STATEMENT OF JURISDICTION

The Indiana Supreme Court entered its decision on rehearing, February 4, 2003. App. 28a. Petitioner evokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments of the Constitution of the United States of America:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Charge. Wilkins was charged by the Indiana Disciplinary Commission with making three statements in a petition for transfer (review)[1] to the Indiana Supreme Court and brief in support that he knew to be false, or with reckless disregard as to their truth or falsity, concerning the integrity of a judge in violation of Indiana Rule of Professional Conduct 8.2(a) (ABA Model Rule 8.2(a)).[2] Two charges were ultimately dismissed as the statements were found to be merely recitations of the requirements for a petition for transfer under the then-applicable Indiana Rules of Appellate

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[1] The Petition addressed the Indiana Court of Appeals decision in *Michigan Mutual Insurance Company v. Sports, Inc.*, 698 N.E.2d 834 (Ind. App. 1998), with the Opinion by Judge Darden, concurred in by Judge Garrard, and concurred in result by Judge Rucker, who was subsequently appointed to the Indiana Supreme Court.

[2] Rule 8.2(a) provides: "A lawyer shall not make a statement that the lawyer knows to be false or with regardless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. . . ."

Procedure. *In re Wilkins*, 777 N.E.2d 714, 716-717 (Ind. 2002) (App. 6a-7a) ("*Wilkins I*"). However, the second of these statements stated as grounds for review as required by the Indiana appellate rules that the lower court had misstated facts and misapplied the law as follows:

> "The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are **directly** on point. Clearly, such a decision should be reviewed by this Court: . . .[2]" (Emphasis in original.) (App. 4a)

and included the following footnote 2:

> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision). (App. 4a)

(hereafter "footnote 2").[3]

Pursuant to Indiana's disciplinary rules, a hearing was held before a hearing officer. Despite unrefuted evidence that Wilkins intended in footnote 2 to question whether the appellate decision was result-based ignoring law and fact, and despite the Commission's burden to prove its charges by clear and convincing evidence, the hearing officer found that Wilkins violated Rule 8.2(a) by signing a brief that included footnote 2 and recommended a thirty-day suspension.[4]

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[3] Prior to the charge, Petitioner had already received a severe sanction for the footnote. When it received the transfer brief, the Indiana Supreme Court, acting *sua sponte* through its contempt powers, struck the brief, concluding that footnote 2 was "[a] scurrilous and intemperate attack on the integrity of the Court of Appeals." *Michigan Mutual Insurance Company v. Sports, Inc.*, 706 N.E.2d 555 (Ind. 1999). The Court then denied the Petition.

Petitioner Raised First Amendment Issues. Following the Hearing Officer's recommendation, Wilkins petitioned the Supreme Court of Indiana for *de novo* review of the hearing officer's findings and conclusions. In seeking review of the hearing officer's findings, Petitioner again urged that footnote 2 was but a critique of an appellate decision as result-based ignoring law and fact. It was not meant by the speaker or understood by the bench, bar or legal writers to accuse judges of misconduct or to challenge their integrity – as demonstrated by more than 1200 cases and more than 3000 law journal articles in which such language appears. As he had done before the hearing officer, Wilkins urged that such speech was protected by the First Amendment,[5] first because it was incapable of being proven true or untrue as an opinion under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) and second because there was no showing of actual malice –

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[4] Under Indiana's disciplinary scheme, the Supreme Court makes the final decision regarding attorney violations and discipline. The hearing officer merely takes evidence and makes recommendations to the court.

[5] The First Amendment restrictions apply to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Bridges v. California*, 314 U.S. 252, 268 (1941); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *New York Times Company v. Sullivan*, 376 U.S. 254, 276 (1964), and *Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

both properly the Disciplinary Commission's burden as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964). (Respondent's Petition for Review of Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation, p. 3, Brief in Support, p. 10-14, and Reply Brief, pp. 7-9.) Indeed, there was not even a scinitilla of evidence to contradict Petitioner's testimony on either issue, let alone clear and convincing evidence of Petitioners guilt. The Indiana Supreme Court decided the First Amendment issue, *infra*.

Petitioner's Second Punishment By the Indiana Supreme Court.[6] On review of the findings, three of the five justices, in a Per Curiam Opinion, nevertheless found that Respondent violated Rule 8.2(a) by footnote 2 and punished Petitioner again, this time levying a thirty-day suspension from the practice of law.[7] *Wilkins I*, 777 N.E.2d at 717-19 (App. 7a-12a).

Although the Per Curiam recognized "the Constitutional tension between the First Amendment and the Code [of Professional Conduct]," it rejected the applicability of *New York Times* without discussion, concluding that "a generalized test [for attorney speech] cannot be drawn. . . ." *Id.* at 716 (App. 8a) (citation omitted). To reach its conclusion on the constitutional issues, the Per Curiam looked solely[8] to its prior discussion of free speech and attorneys in *In Re Friedland*, 416 N.E.2d 433 (Ind. 1981), which not only predated Rule 8.2(a), but which relied on attorney First Amendment cases involving only commercial speech.[9] The Per Curiam then placed the burden of proof on Petitioner – again rejecting without addressing *Milkovich* – and held that Petitioner "offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for the appellee, no matter what. Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission."[10] *Id.* at 717 (App. 9a).

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[6] As noted, the Supreme Court was not unfamiliar with the matter as it had previously sanctioned Petitioner by striking the transfer brief. *See* n.3, *supra*.

[7] The Per Curiam did not adopt the hearing officer's findings but made new findings.

[8] The Per Curiam refused to confront *New York Times*, *Milkovich* and the meaning of "result-based ignoring law and fact" as demonstrated by the repeated use of such a critique in dissents

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and law journals, as urged by Wilkins. Rather, Per Curiam erroneously stated (*see* Petition, Brief in Support and Reply as cited at p. 5, *supra*) that: "in his petition for review, the respondent argues that the application of Prof. Cond. R. 8.2 in this case would be an unconstitutional restriction of free speech. However, he provides no authority specifically illustrating why or how his statements are protected by state or federal constitutional provisions." 777 N.E.2d at 716 (App. 7a). And further the Per Curiam stated: "We are not persuaded by respondent's contention (again unsupported by any cited authority) that his statements are merely a 'critique of the Opinion in a format used throughout the bench, bar and journals.'" 777 N.E.2d at 718 (App. 9a).

[9] *Friedland* involved extreme conduct in which the attorney engaged in a practice of intimidation and abusive litigation in an attempt to influence public officials, adverse witnesses, and the Disciplinary Commission and staff. 416 N.E. 2d at 438.

[10] The Per Curiam Opinion also contravenes the First Amendment by determining that even if the charges were true, Wilkins must confine such charges to the Judicial Qualifications Commission. Not only is such holding contrary to fundamental First Amendment precepts, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829

(Cont'd)

Two justices offered strong dissents that focused squarely on the First Amendment issues raised by Wilkins. Justice Sullivan wrote that footnote 2 was "a statement of 'rhetorical hyperbole,' incapable of being proven true or false," and therefore was protected by the First Amendment. *Id.* at 719 (App. 12a) (citing *Standing Comm. on Discipline of the United States Dist. Court for Central District of California v. Yagman*, 55 F.3d 1430, 1438, 1441 (9th Cir. 1995)). Justice Boehm wrote that footnote 2 was protected speech under the First Amendment because there was no evidence to support the "actual malice" test of *New York Times*, which must apply "to determinations that an ethics violation has occurred by expressing criticism of a legal opinion." *Id.* at 720 (App. 14a). Justice Boehm further warned that the Court, being the "victim", "judge, jury, appellate reviewer" and prosecutor, should exercise "the utmost restraint in imposing discipline for expression of criticism of the courts" (*id.*) (App. 15a) – echoing this Court's observation from *New York Times* that judges need be able to "thrive in a hardy climate." (Citing *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

Recusal And Rehearing. Following the Per Curiam decision, Petitioner moved for rehearing on the First Amendment issues and because Justice Rucker, who cast the deciding vote in the Per Curiam opinion, had not recused himself even though he had been on the three-judge appellate panel that the Commission alleged was impugned by footnote

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(1978) (First Amendment bars criminal punishment of persons for divulging truthful information regarding judges' misconduct as neither the reputation of a judge nor judicial integrity are sufficient to justify punishment of speech), but it directly limits attorneys' ability to protect their clients' interests.

2. Justice Rucker ultimately recused himself,[11] but did so before voting on rehearing, thus locking in his third and decisive vote as part of the Per Curiam rejecting Petitioner's First Amendment challenge.[12] Justice Rucker explained that he had forgotten his earlier participation in the *Michigan Mutual* case, a fact that calls into question both whether the members of the Per Curiam had read the *Michigan Mutual* case before levying discipline and whether the language in footnote 2 was as harsh and "scurrilous and intemperate" as the Per Curiam concluded.

As expected, on rehearing the remaining justices split 2-2 on the conviction. Hence, *Wilkins I* remains the Court's decision on the First Amendment issues. However, three of the four remaining justices voted to reduce the thirty-day suspension to a public reprimand. *In re Wilkins*, 782 N.E.2d 985 (Ind. 2003) (App. C) ("*Wilkins IV*"). Because Justice Rucker did not participate, the reprimand was the result of a compromise by Justice Boehm, who concurred in the sanction only to ensure that Petitioner did not receive a suspension from the practice of law for what Justice Boehm firmly believed to be constitutionally protected speech. *Id.* at 987-988 (App. 32a-34a). Justice Sullivan stood by his dissent.

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[11] *In re Wilkins*, 780 N.E.2d 842 (Ind. 2003) (App. B) ("*Wilkins III*"). An earlier reported decision granted Wilkins' motion to stay the suspension pending appeal. 778 N.E.2d 1290 (Ind. 2002) ("*Wilkins II*").

[12] Indiana appellate practice requires that a majority of the court vote for rehearing. Given that the case was decided by a 3-2 vote, Wilkins faced the likelihood that if Justice Rucker recused before voting on rehearing, the Per Curiam decision would stand. *See Nat. City Bank, Inc. v. Shortridge*, 691 N.E.2d 1210, 1211 (Ind. 1998). As discussed below, this would have happened but for Justice Boehm's decision not to let the technicality overrule common sense and fairness.

Reciprocal Enforcement Denied By Federal District Court, Southern District of Indiana. Within weeks of the Indiana Supreme Court issuing *Wilkins IV*, the United States District Court for the Southern District of Indiana issued an order to show cause why it should not impose reciprocal discipline on Petitioner. Under S.D. Ind., Disciplinary Rule, II.D, following the criteria set forth by this Court in *Selling v. Radford*, 243 U.S. 46 (1917), the District Court was required to impose reciprocal discipline unless it clearly appeared: (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept its final conclusion on that subject; or (3) that the imposition of the same discipline by the court would result in grave injustice; or (4) that the misconduct established is deemed by the court to warrant substantially different discipline.

In responding to the show cause order, Wilkins made exactly the same arguments and cited exactly the same cases he had before the Indiana Supreme Court, arguing that the speech in footnote 2 was protected by the First Amendment. After due consideration, the Chief Judge of the District Court explicitly found "that the Respondent has shown cause why this Court should not impose discipline identical to that imposed by the Indiana Supreme Court," and no discipline was imposed. (App. 35a).

REASONS FOR GRANTING THE WRIT

Summary. At the most fundamental level, this case is about whether attorneys enjoy the First Amendment right to advocate, to criticize the judicial branch of their government without fear of reprisal. The Indiana Supreme Court has joined a growing number of state courts in creating a double standard pursuant to which attorneys critical of the judiciary can expect far less First Amendment protection than critics of officials in the other branches. Under the banner of promoting public confidence in the judiciary – by wielding judicial power to silence advocacy – these courts have achieved a result contrary to that stated goal.

This case is worthy of this Court's attention both to put a halt to this disturbing trend and to resolve the deep split, aggravated by the Indiana Per Curiam, in the state high courts' application of the First Amendment standards in this context (including *New York Times*, *Garrison*, *Hepps* and *Milkovich*[13]). Some high courts reject both actual malice and placing the burden of proving falsity upon the charger, so that speech incapable of being proven true or false is not protected, while other state high courts reject only actual malice, and the increasingly-isolated minority require full First Amendment protection.

The Indiana court and like-minded state high courts around the country have gradually and insidiously transformed the shield provided by *New York Times* into a sword whereby Rule 8.2(a) is used by the judiciary to punish, if not silence, critics and limit advocacy. This has led courts to punish attorneys for contending that a court "ducked" constitutional issues, made a "politically motivated" decision, was "intellectually dishonest", made a "highly unethical and biased" decision or, as in this case, made a result-based decision in disregard of law and fact. In contrast, other courts, in keeping with this Court's precedents, have upheld the constitutional imperative of protecting advocacy rather than judicial sensibilities and have found, as did the two dissenters of the Indiana court, that advocacy of the foregoing variety is mere "rhetorical hyperbole" – protected speech, incapable of being proven true or false, and therefore protected by the First Amendment.

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[13] *Garrison v. State of Louisiana*, 379 U.S. 64 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

This Court has recognized again and again that "the ultimate responsibility to define the limits of State power regarding freedom of speech and expression rests with this Court." *Wood v. Georgia*, 370 U.S. 375, 386 (1962); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 282 (1974). The First Amendment limits on a court's power to act as the victim, prosecutor, judge, jury, and appellate reviewer to punish attorney advocacy critical of courts is badly in need of this Court's attention.

Split Among State Supreme Courts And The Circuits. The state high courts are widely split on the extent of First Amendment protection for attorneys critiquing the judiciary. Many have rejected, or simply ignored,[14] that *New York Times*,

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[14] *See In re Graham*, 453 N.W.2d 313, 320 (Minn. 1990), *cert. den. sub nom., Graham v. Wernz*, 498 U.S. 820, (1990) ("neither Minnesota courts nor the United States Supreme Court have expressly extended the constitutional qualified privilege beyond the facts of civil and criminal proceedings to attorney discipline ones."); *In re Green*, 11 P.3d 1078, 1083 (Colo. 2000) ("because neither we nor the Supreme Court has addressed the First Amendment

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Garrison, *Hepps* and *Milkovich* determined the issues, which then leaves them free to develop their own standards giving attorneys less First Amendment protection to advocate critically and the judiciary more power to chill advocacy. Some ignore all First Amendment standards, others reject the requirement of actual malice, others reject the burden of proving falsity (and hence the protection for opinion as incapable of being proven true or untrue). This is so, despite most state high courts having adopted ABA Model Rule 8.2(a), which was intended to incorporate the very standards these courts have rejected.[15] When confronted with

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implications of disciplining attorneys for their criticism of the judiciary, we look by analogy to *New York Times Co. v. Sullivan*. . . ."); *In re Westfall*, 808 S.W.2d 829, 836 (Mo. 1991), *cert. den.*, 502 U.S. 1009, (1991) ("some courts have simply refused to apply the *New York Times* test, holding it inapplicable to a disciplinary proceeding"); *Matter of Johnson*, 240 Kan. 334, 729 P.2d 1175, 1180-81 (1986); *Matter of Terry*, 271 Ind. 499, 394 N.E.2d 94, 95 (1979), *cert. den. sub nom.*, *Terry v. Indiana Supreme Court Disciplinary Comm'n.*, 444 U.S. 1077 (1980)).

[15] *See In re Green*, 11 P.3d at 1084 n.4 "indeed, . . . RPC 8.2(a) incorporates the *New York Times* standard. . . ."; *In re Graham*, 453 N.W.2d at 321, *cert. den.*, 498 U.S. 820 (1990):

> commentators have noted that Rule 8.2, ABA MRPC, is consistent with the constitutional limits placed on defamation actions by the United States Supreme Court cases of *New York Times* and *Garrison*. *See, e.g.*, *Hazard & Hodes*, *supra*, at 552-54. Nevertheless, the standard cannot be equivalent to that of *New York Times* and its progeny, because the standard for determining actual malice must be objective when dealing with attorney discipline.

conduct deemed unacceptable, these high courts simply amend "on the run" Rule 8.2(a) and the First Amendment.

States Rejecting New York Times/Milkovich. In *Wilkins I*, Indiana joined those state high courts which simply ignore *New York Times/Milkovich*. See *In re Wilkins* I (imposing the burden of proving truth upon the speaker[16] of a matter not capable of being proven untrue, ignoring *New York Times*, *Garrison*, *Hepps*, *Milkovich* and Rule 8.2(a)); *In re Frerichs*, 238 N.W.2d 764, 766, 767 (Iowa 1976) (disciplining an attorney for stating in a petition for rehearing that the Court "willfully avoided" or "ducked" constitutional issues properly raised, rejecting out of hand the First Amendment because the "conduct here involved is generally held not protected by freedom of speech guarantees under the first amendment," in contravention of *New York Times* and *Garrison*);[17] *State v. Nelson*, 504 P.2d 211, 214-15 (Kan. 1972) (rejecting the applicability of First Amendment protection as "untenable because *New York Times* case law is clearly inapplicable to a disciplinary proceeding because such cases . . . deal with constitutional privilege afforded news media" and "an individual respondent has no constitutional privilege to defame. . . ."); *Kentucky Bar Assoc. v. Heleringer*, 602 S.W.2d 165 (1980), *cert. den. sub nom., Heleringer v. Kentucky Bar Association*, 449 U.S. 1101, (1981) (disciplining an attorney for stating to the press that a judge's decision was "highly unethical and grossly unfair," rejecting First Amendment considerations based on *In re Frerichs*); *In re Holtzman*, 577 N.E.2d 30, 32 (N.Y. 1991), *cert. den. sub nom., Holtzman v. Grievance Committee For Tenth Judicial Dist.*, 502 U.S. 1009, (1991):

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[16] Other cases avoid the burden of proof requirement, much like the Indiana Per Curiam, but focus on the factual basis for the statement at issue. *See In re Westfall*, 808 S.W.2d 829 (Mo. 1991) (affirming a disciplinary finding against an attorney for accusing a judge of being "intellectually dishonest" based on a failure to investigate, as opposed to whether there was proof of the accusation being untrue).

[17] Subsequently, the Iowa Supreme Court further explained *In re Frerichs* stating: "In *Frerichs*, we . . . recognized a lawyer acting in a professional capacity, may have some fewer rights to free speech than would a private citizens *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart, J., *concurring*). . . ."

> neither this Court nor the Supreme Court has ever extended the *New York Times* standard to lawyer discipline and we decline to do so here. . . . Such standard would be wholly at odds with the policy in *Rules Governing Professional Responsibility* which seeks to establish a 'minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.'

States Rejecting Actual Malice. Other state high courts for inexplicable reasons reject the actual malice standard of *New York Times/Garrison* for attorney speech critical of the judiciary based upon the judiciary's belief that public confidence in the judiciary and administration of justice is deserving of more protection than the state interests involved where the speaker is challenging the other branches. Those state high courts have generally followed the Minnesota Supreme Court, which rejected the actual malice test, lowering the First Amendment protection to objective malice under a reasonable attorney standard for an attorney charged with making an untrue statement impugning the integrity of a judge. *See In re Graham, supra*, in which the Minnesota Supreme Court adopted a purely subjective standard, reasoning that, even though Rule 8.2(a) incorporated *New York Times/Garrison* standards, actual malice would not be required because of the dissimilarity between defamation, which protects but a private wrong, and Rule 8.2, which encompasses a "much broader spectrum . . . in promoting the public, the administration of justice and the profession." *See also In re Topp*, 925 P.2d 1113 (Idaho 1996), *cert. den. sub nom., Topp v. Idaho State Bar*, 520 U.S. 1155, (1997) (disciplining an attorney who accused a judge of making a politically motivated decision, based on the Court's conclusion that "a reasonable attorney . . . would not have made this statement in question"); *United States District Court for Eastern Dist. of Washington v. Sandlin*, 12 F.3d 861 (9th Cir. 1993); and *Yagman*, 55 F.3d at 1436 (in rejecting actual malice, the Court explained "there are significant differences between the interest served by defamation law and those served by Rules of Professional Ethics. . . . Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges . . . but to preserve public confidence . . .");[18] *Florida Bar v. Ray*, 797 S.2d 556, 559 (Fla. 2001), *cert. den. sub nom., Ray v.*

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[18] Although it rejected acted malice, the Ninth Circuit correctly imposed the burden of proving falsity on the charger, as has Idaho, which adopted the Ninth Circuit approach. *See Standing Committee on Discipline v. Yagman*, 95 F.3d 1430 (9th Cir.) (accusation that a judge "has a penchant for sanctioning Jewish lawyers" was incapable of being proven true or untrue, which under *Milkovich* was protected under the First Amendment. The State failed to discharge the burden of proof the attorney's accusation that the judge was "drunk on the bench" was untrue, as required by *Hepps*). However, *Yagman* has been rejected by Delaware and the Seventh Circuit. *See In re Shearin*, 765 A.2d 930, 938 (Del. 2000) (attorney disciplined for accusation that a judge suffered a "progressive mental disability" affirmed based on the absence of "some factual basis for the lawyer's accusation"); *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995).

Florida Bar, 535 U.S. 930, (2002) (attorney disciplined for challenging the fairness and integrity of an administrative law judge in a letter to the Chief Immigration Judge, based on the court's determination that under an objective standard, nothing had transpired in an earlier hearing to justify the accusations).

Minority Upholds First Amendment. The better reasoned, but increasingly isolated, state high court opinions accept and apply the same First Amendment standards to attorney speech critical of the judiciary as this Court has developed to protect these who critique public officials in the other branches. *See In re Green*, *supra*, (requiring proof of a false statement of fact "which the attorney uttered . . . with actual malice" in finding an attorney's accusation that a judge was a "racist and bigot" was an opinion not capable of being proven true or false and therefore was protected under *Milkovich*); *State ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 968 (Okla. 1998) (rejecting disciplining an attorney for accusing a judge of being a "racist" because under the First Amendment "the statements were not shown to be incorrect statements of fact . . . no evidence was introduced to demonstrate that the statements were false . . ." as required by *Hepps* and *Milkovich*); *Committee on Legal Ethics of West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W. Va. 1988) (attorney charged with professional misconduct for accusing a judge of an investigation that was a "farce" or "political" which pursuant to *New York Times* and *Garrison* could not be made with knowledge of falsity or in reckless disregard of whether true or untrue); and *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. App. 1974) (reversing grievance committee's finding of unprofessional conduct by an attorney's letter which agreed with a newspaper critique of a judge as to knowledge of the law and courage to rule fairly and harshly, based on *New York Times* and *Garrison*).

Judicial Protectionism Damages The Judiciary. The reasoning of those state high courts which have held *New York Times* and *Garrison* inapplicable to attorney discipline cases is so vacuous as to suggest judicial protectionism.[19] To say that Mr. Garrison, a Louisiana prosecutor, should receive less First Amendment protection against being disciplined by the Louisiana Supreme Court for suggesting "racketeering influences on our eight vacation minded judges" than when he was convicted of criminal defamation is unsupportable. Yet, this is the position of an increasing body of state high court decisions – elevating the judiciary above public officers in the other branches, while limiting criticism from those best suited to make it.

The irony is that these state high courts pay no heed to the genesis of *New York Times*, *Garrison*, *Hepps* and *Milkovich* – that public officials should receive no more protection than judicial officers against critical speech. In *New York Times*, this Court noted that

> concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt

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[19] For instance, the Minnesota Supreme Court in *Graham* rejected these First Amendment standards because "defamation is a wrong directed at an individual" while "criticism impugning the integrity of [a judge] adversely affects the administration of justice" (453 N.W.2d at 321). Similarly, the Ninth Circuit concluded that, because "false statements impugning the integrity of judges erodes public confidence without serving to publicize problems that justifiably deserve attention," the *New York Times* standards are somehow inapplicable. *In re Yagman*, 55 F.3d at 1437. The Indiana Per Curiam rejects these standards, without discussion, over two dissents and briefs properly framing them, and concludes again that public confidence in the judiciary required Petitioner to come forth with proof of truth, as opposed to the charger proving falsity.

> of criticism of the judge or his decision. . . .[20] This is true even though the utterance contains 'half truths and misinformation.'[21] Such repression can be justified, if at all, only by clear and present danger of the obstruction of justice. . . .[22]

376 U.S. at 272-273. From this history, the Court concluded that "if judges are to be treated as 'men of fortitude, able to thrive in a hardy climate', surely the same must be true of other government officials. . . ." 376 U.S. at 273.

In *Garrison*, this Court established that the reasons leading to *New York Times* "apply with no less force merely because the remedy is criminal. . . ."[23] 379 U.S. at 73. Attorney discipline for speech, being quasi criminal, *In re Ruffalo*, 390 U.S. 544, 551 (1968), can be entitled to no less First Amendment protection. This Court has established that public officials can impinge on freedom of expression no more than judicial officers – surely judicial officers cannot at this late date flip the proposition to become exulted over all other public officials.

While this Court has lessened the protection for speech concerning private figures[24] or where a private figure and speech of purely private concerns are involved,[25] surely attorney advocacy and criticism of the judiciary do not fall within such parameters. Moreover, where the burden of proof of falsity is concerned, speech incapable of being proven true or untrue, as an opinion, is fully protected at all levels. No rationale can support the Indiana Per Curiam placing the burden on Petitioner to come forth with evidence to prove the truth of a matter which is so clearly incapable of being proven true or untrue – that the Court reached a result-based decision ignoring law and fact or, as in the other State cases, that a state supreme court "ducked" constitutional issues, or was "intellectually dishonest", etc.

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[20] *Bridges v. California*, 314 U.S. 252 (1941).

[21] *Pennekamp v. Florida*, 328 U.S. 331, 342 (1946).

[22] *Wood v. Georgia*, 370 U.S. 375 (1962).

[23] "The 'erroneous statement is inevitable in free debate' . . . Only those false statements made with a high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions."

[24] *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974).

What these cases suggest is over sensitivity to criticism and under sensitivity to the damage from being overly-protective. Although courts frequently justify their decision to restrict attorney speech on a desire to further public confidence in the judiciary, in truth they are producing the opposite result. The reaction of the public and legal scholars to the Indiana Supreme Court decision vividly illustrates the public's loss of confidence in the judicial system when the judiciary is unable or unwilling to tolerate even mild attorney criticism of a type commonly engaged in by judges themselves.[26] Ignoring the First Amendment in the name of judicial protectionism does more to harm the public's confidence in the judiciary than any amount of judicial criticism in the course of advocacy.

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[25] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

[26] *See* Adam Liptak, "Indiana Court Bars Lawyer For Criticizing An Opinion," *New York Times*, November 3, 2002 (Exhibit 1 to Petitioner's Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse); Steven Lubet, "Free speech rights don't end in courtroom," *Chicago Sun-Times*, November 6, 2002 (Exhibit 3 to Petitioner's Consolidated Petition for Rehearing and Motion for

(Cont'd)

CONCLUSION

Appellate advocacy by its very nature requires critical analysis of judicial reasoning. A growing body of state high courts are elevating the importance of the judiciary over the other branches by limiting First Amendment protections for attorney advocacy critical of the judiciary. These courts have used their disciplinary powers, powers not available to any other branch, in a manner which inhibits and chills (if not altogether precludes) open, vigorous analysis and debate as to the correctness of judicial decisions. Counsel for Mr. Wilkins have indeed been chilled in drafting this very petition – for if there were ever a decision deserving[27] critique in the words commonly used by the bench, bar and legal writers (which critique counsel cannot now make) – *Wilkins I* is it.

(Cont'd)

Justice Rucker to Recuse); "Court Assaults on Free Speech," *Fort Wayne Journal-Gazette*, Nov. 10, 2002 (Exhibit 4 to Petitioner's Reply Brief on Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse); Steven Lubet, "Tempest in a Petition for Transfer, *The Legal Times*, December 2, 2002 (Exhibit 9 to Reply Brief on Petitioner's Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse); John Strauss, "Let he who has not spoken out cast the first suspension," *The Indianapolis Star*, December 6, 2002 (Exhibit 10 to Petitioner's Reply Brief on Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse); Paul McAuliffe, "Too quick to discipline," *Evansville Courier & Press*, December 15, 2002 (Exhibit 11 to Petitioner's Reply Brief on Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse).

[27] *See* n.8, *supra*.

As demonstrated above, this is not a phenomenon limited to Indiana. It is a nationwide problem: worthy of this Court's attention. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF INDIANA DATED OCTOBER 29, 2002

Supreme Court of Indiana

No. 49S00-0005-DI-341.

In the Matter of Michael A. **WILKINS.**

Oct. 29, 2002

DISCIPLINARY ACTION

PER CURIAM.

Attorney Michael A. Wilkins is an experienced appellate practitioner. In a brief supporting a petition for transfer to this Court, he stated that an opinion of the Indiana Court of Appeals left him wondering whether the Court of Appeals was determined to find for the adverse party, and whether it then said whatever was necessary to reach that conclusion. We find today that such statements violated Ind.Professional Conduct Rule 8.2(a) and warrant the respondent's suspension from the practice of law in this state.

This case is now before us upon the hearing officer's findings of fact and conclusions of law and the respondent's petition for our review of those findings and conclusions. Where a party petitions this Court for review, we review *de novo* the record presented us to reach the ultimate conclusion as to misconduct and sanction therefore. *Matter of Robak*, 654 N.E.2d 731 (Ind.1995). Additionally, the respondent has requested oral argument on the questions presented in his petition for review. We deny that request.

Appendix A

The respondent is an attorney in good standing, having been duly admitted to practice law in this state on October 14, 1988. He is a member of the litigation section in the Indianapolis law firm of Ice Miller and concentrates his practice in family and adoption law, appeals, general litigation, and media law. During 1997, 1998, and 1999, the respondent represented and served as local counsel for Michigan Mutual Insurance in an appeal of an adverse verdict from the Vigo Superior Court. On August 27, 1998, the Court of Appeals issued its opinion in *Michigan Mutual Insurance Company v. Sports, Inc.*, 698 N.E.2d 834 (Ind.Ct.App.1998). The court's opinion affirmed the trial court's verdict and award. Thereafter, primary counsel for Michigan Mutual prepared a draft brief to accompany a "Petition to Transfer" to this Court and forwarded the draft to the respondent. The respondent then edited the draft and "toned down" the tenor of the brief.

The respondent believed that *Michigan Mutual Insurance Co. v. Sports, Inc.* misstated material facts and ignored or misapplied controlling precedent, such that transfer to this Court may have been appropriate under Ind. Appellate Rule 11(B)(2)(c) and (f).[1]

Footnote 15 of the Court of Appeals opinion states:

> Specifically, Michigan Mutual claims the Hopper Agency had "limited authority to bind [it] to coverage and accept premiums on its behalf," but not the authority to "alter policy provisions, appoint subagents, or do anything else that general

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[1] That rule was the precursor to the current App.R. 57.

> agents typically can do." Michigan Mutual's Brief at 23. It cites neither authority nor evidence in the record to support the latter proposition.

On September 25, 1998, the respondent signed and filed Michigan Mutual's "Petition to Transfer" and "Brief in Support of Appellant's Petition to Transfer" with the Clerk of this Court. Even though the respondent did not necessarily author the words at issue here (a task admittedly performed by Michigan counsel), the respondent signed the brief pursuant to Ind.Admission and Discipline Rule 3(2)(d), and was therefore "jointly responsible therefore."

The respondent, in the "Petition to Transfer" challenged the Court of Appeals' decision, in relevant part, pursuant to App.R. 11(B)(2)(f), by arguing:

> 4. The opinion of the Court of Appeals is in error for the following reasons:
>
>> A. The opinion erroneously and materially misstates the record by making affirmative misstatements regarding the evidence, which directly affected the court's ultimate conclusion (specific misstatements, and their prejudicial effect on Michigan Mutual, are discussed in the accompanying Brief in Support); [. . .]

The respondent, in the "Brief in Support of Appellant's Petition to Transfer," amplified his client's position, *inter alia* with the following statements:

> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.[2]
>
> . . .

On March 5, 1999, this Court denied the "Petition to Transfer" and ordered the supporting brief stricken as a "scurrilous and intemperate attack on the integrity of the Court of Appeals. . . ." *Michigan Mutual Insurance Company v. Sports, Inc.*, 706 N.E.2d 555 (Ind.1999).

At disciplinary hearing, the respondent contended that an agency agreement which had been cited to the Court of Appeals in the record, as well as the testimony of two trial witnesses, supported his contention that the Court of Appeals misstated the record and facts in that there was evidence in the record to establish a limited agency as opposed to a general agency. The respondent also cited case law to the Court of Appeals, which he contended the Court of Appeals ignored.

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[2] Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

After this Court issued its decision denying transfer, the respondent contacted the office of the John T. Sharpnack, Chief Judge of the Indiana Court of Appeals, and Randall T. Shepard, Chief Justice of the Supreme Court of Indiana, to schedule meetings with them to offer his personal apology. However, before being able to personally speak with Judge Sharpnack or Chief Justice Shepard, the respondent received the "Request for Investigation" which initiated these disciplinary proceedings, after which he wrote to both Judge Sharpnack and Chief Justice Shepard, offering to apologize in person and to acknowledge that the footnote was "overly-aggressive and inappropriate and should never have made its way into our Brief."

The Commission charged the respondent with violating Prof. Cond. R. 8.2(a) by making statements that he knew to be false, or with reckless disregard as to their truth or falsity concerning the integrity or qualifications of a judge, or, in this case, a three-judge panel of the Indiana Court of Appeals.[3]

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[3] Rule Indiana Professional Conduct Rule 8.2(a) states, in relevant part:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

The hearing officer found that the respondent violated Prof.Cond.R. 8.2(a) by the statements he made in footnote 2, but did not find a violation as to the other quoted sections, concluding that the statements merely paraphrased provisions of App.R. 11(B), governing grounds for transfer to this Court. We turn back to the language used by the respondent in his petition for transfer and supporting brief:

> The opinion erroneously and materially misstates the record by making affirmative misstatements regarding the evidence . . .
>
> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point.

We note that relevant portions of former App.R. 11(B)(2) provided:

> Errors upon which a petition to transfer shall be based may include:
>
> > (f) that the opinion or memorandum decision of the Court of Appeals erroneously and materially misstates the record, concisely setting out the misstatement (with reference to the record where appropriate), the materiality of the misstatement and specifically stating the resulting prejudice to the petitioner.

We find that the respondent's statements quoted above, although heavy-handed, roughly paraphrase the bases of transfer as set forth in former App.R. 11(b) such as to avoid violation of Prof.Cond.R. 8.2(a).

The respondent's comments in footnote 2, however, are not even colorably appropriate. In footnote 2 of the "Brief in Support of Appellant's Petition to Transfer," the respondent suggested that the judges on the Court of Appeals may have been motivated in their decision making by something other than the proper administration of justice, and, in fact, suggested unethical motivations. We find that his comments in footnote 2 violated Prof.Cond.R. 8.2(a) because they were made with reckless disregard as to the truth or falsity concerning the integrity of a three-judge panel of the Court of Appeals.

In his petition for review, the respondent argues that the application of Prof.Cond.R. 8.2 in this case would be an unconstitutional restriction of free speech. However, he provides no authority specifically illustrating why or how his statements are protected by state or federal constitutional provisions.

In *Matter of Friedland*, 275 Ind. 214, 416 N.E.2d 433 (1981), a respondent attorney was accused of attempting to influence public officials by threatening and publishing critical comments about the Commission. The respondent argued that his conduct was protected free speech. There, we stated:

> This Court in the past has not addressed, specifically, the constitutional tension between the First Amendment and the *Code of Professional Responsibility*. Upon reflection of this question, it is our belief that a generalized test cannot be drawn. Each prohibition, circumscribed by the factual setting present in a particular case, must be examined in light of the affected State interest and measured against the limitation placed on the freedom of expression.

Id. at 437. The prohibitions in Prof.Cond.R. 8.2(a) are concerned with preserving the public's confidence in the administration of justice. *See, e.g.*, *Matter of Garringer*, 626 N.E.2d 809, 813 (Ind.1994) ("We note that the duty violated by the Respondent [in violating Prof.Cond.R. 8.2] was his obligation to refrain from acting in a way that damages the integrity of the judicial system. . . . As we have stated, '[u]nwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purpose and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process [other citation omitted].' "). *See also Comment* to Prof.Cond.R. 8.2.[4] Applying the *Friedland* analysis here, we find that the respondent offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for appellee, no matter what. Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission. *See Matter of Becker*, 620 N.E.2d 691 (Ind.1993) (noting that if a lawyer believes a judicial officer had engaged in misconduct, the appropriate course of action would be to bring a complaint to the Judicial Qualifications Commission). In this case, the state's interest in preserving the public's confidence in the judicial system and the overall administration of justice far outweighed any need for the respondent to air his unsubstantiated concerns in an improper forum for such statements.

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[4] That Comment provides, in relevant part:

> Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

We are also not persuaded by the respondent's contention (again unsupported by any cited authority) that his statements were merely a "critique of the Opinion in a format used throughout the bench, bar, and journals." Our current rules of appellate procedure dictate the boundaries of acceptable appellate practice. For example, App.R. 46(A)(8)(a) requires that arguments on appeal must be supported by cogent reasoning, citations to authorities, statutes or the record. A statement used in a document filed before the appellate courts that contains an assertion the lawyer knows to be false or made with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge is neither a "format" contemplated by our appellate rules nor allowed by our *Rules of Professional Conduct*.

Having found misconduct, we now address the issue of proper sanction. In this analysis, we examine the nature of the violation, specific acts of the attorney, the Court's responsibility to preserve the integrity of the Bar, and any risk to which the public will be subjected if the attorney is permitted to continue in the profession, any consequences that flow from the alleged conduct, the state of mind of the attorney, and any exacerbating or mitigating factors. *Matter of Charos*, 585 N.E.2d 1334 (Ind.1992). The hearing officer found that the respondent has maintained an outstanding and exemplary record for honesty, integrity, and truthfulness among his peers in the Bar, and among members of the judiciary. He also found that the respondent made a full and complete disclosure of the facts surrounding this disciplinary matter and has maintained a completely cooperative attitude toward the disciplinary process. Also cited was his extensive involvement in community and civic activities.

We also consider aggravating factors. Although the parties submitted a written stipulation regarding the respondent's remorse for his actions, the hearing officer found that the respondent's testimony "belied his belief that this disciplinary action stems merely from a poor choice of words." The respondent's stated remorse related only to his feelings of personal embarrassment and public humiliation as the result of this Court's order striking the offending brief. In essence, the respondent averred that, although he might use different language, he believes in the substance of the language contained in the footnote. That he chose to contest this matter through all procedures available under the Admission and Discipline Rules further underscores our conclusion that his remorse only attaches to the fact his statements were not without consequence, notwithstanding his earlier attempts personally to apologize to members of the appellate bench.

Similar instances of violation of Prof.Cond.R. 8.2 have garnered short suspension. *See, e.g.*, *Becker*, *supra*, (30 day suspension from the practice of law for accusations that a trial judge manipulated the record in order to rule against his client); *Matter of Reed*, 716 N.E.2d 426 (Ind.1999) (public reprimand for stating that the trial court judge's "arrogance is exceeded only by her ignorance," and that "she doesn't have any comprehension of what's going on with respect to those [Title IV-D] cases and she refuses to learn."; Chief Justice Shepard and Justice Dickson dissenting as to the sanction, believing it to be inadequate). In *Reed*, the respondent alleged only incompetence. In the present case, the respondent alleged deliberately unethical conduct on the part of the Court of Appeals.

The hearing officer recommended that the respondent be suspended from the practice of law for thirty days. Precedent reveals that a suspension for that period is generally sufficient for the types of statements made by the respondent. This Court is quite troubled by the respondent's continued failure to express remorse for his actions and, in particular, the strong indication that he is sorry only for the negative consequences he suffered because of his actions. In light of these considerations, we conclude that a thirty-day suspension should be imposed.

It is, therefore, ordered that the respondent, Michael A. Wilkins, be suspended for a period of thirty (30) days, beginning December 7, 2002, at the conclusion of which he shall be automatically reinstated to the practice of law.

The Clerk of this Court is directed to provide notice of this order in accordance with Admis.Disc.R. 23(3)(d) and to the hearing officer, and to provide the clerk of the United States Court of Appeals for the Seventh Circuit, the clerk of each of the United States District Courts in this state, and the clerks of the United States Bankruptcy Courts in this state with the last known address of respondent as reflected in the records of the Clerk.

Costs of this proceeding are assessed against the respondent.

SHEPARD, C.J., and DICKSON and RUCKER, JJ., concur.

SULLIVAN, J., dissents with separate opinion.

BOEHM, J., dissents with separate opinion.

SULLIVAN, J., dissenting.

I respectfully dissent. When the respondent here said that "one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported that conclusion)," the respondent made a statement of "rhetorical hyperbole," incapable of being proved true or false. The First Amendment provides lawyers who use such hyperbole concerning the qualifications or integrity of the judge protection from sanction.

See Standing Comm. on Discipline of the United States Dist. Court v. Yagman, 55 F.3d 1430, 1438, 1441 (9th Cir.1995). While there is much debate as to how far this protection extends, I agree with Justice Boehm that it extends at least as far as the statement made by respondent here.

BOEHM, J., concurs.

BOEHM, J., dissenting.

I respectfully dissent. I agree with the Court's conclusion that the quoted passage from the text of respondent's brief is not a ground for discipline. Although it is "heavy handed," it nevertheless asserts grounds for transfer provided by this Court's rules.

I disagree that footnote 2, tasteless as it is, is a ground for disciplinary action. The footnote asserts that "one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported that conclusion)." I do not agree with the respondent's contentions in the offending footnote, and I certainly do not condone the respondent's choice of language in expressing them. Moreover, such intemperate language is very poor advocacy, distracting as it does from the points that are sought to be made. I nevertheless do not believe these opinions are sanctionable. Indeed, I would find them within the broad range of protected fair commentary on a matter of public interest.

Although footnote 2 certainly is understood to challenge the intellectual integrity of the opinion, I do not believe it suggests any motive other than deciding the case in favor of the party the court determined should prevail. It certainly does not suggest criminal motives. In this respect, it seems to me no different from the attacks many lawyers and nonprofessionals have launched on many court decisions, including such notable ones as *Bush v. Gore* and *Brown v. Board of Education.* I cannot see how this footnote differs from the charges occasionally leveled by judges at other judges. For example, Justice Scalia recently contended in *Atkins v. Virginia*, 536 U.S. 304, __, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (Scalia, J., dissenting) that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." *See also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Scalia, J., concurring) (stating that assertions by Justice O'Connor were "irrational" and "cannot be taken seriously").

Although this Court has previously held that the law of defamation and the law of professional conduct do not overlap, *In re Terry*, 271 Ind. 499, 502, 394 N.E.2d 94, 95-96 (1979), the United States Supreme Court has since made it clear that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). It seems clear to me, then, that Justice Sullivan was correct when he noted in *In re Atanga*, 636 N.E.2d 1253, 1259 n. 1 (1994) (Sullivan J., dissenting), that the "actual malice" test of *N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), applies to determinations that an ethics violation has occurred by expressing criticism of a legal opinion. That test is a subjective one, and for a violation to have occurred the respondent "in fact [had to have] entertained serious doubts as to the truth of [the] publication." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

As the Court points out, the respondent set forth the reasons why he believed his criticism of the Court of Appeals was valid. He contends the court's opinion was "factually and legally inaccurate," misstated the record, misapplied case law and did not discuss other relevant cases. He contends that to this day he "believes in the substance of the language contained in the footnote." Although I do not agree with his conclusions, I can find no basis to find that the respondent entertained serious doubts as to the accuracy of his claims. Therefore, I do not agree the respondent's conduct is punishable under Rule 8.2.

Finally, I think we should be very cautious in imposing discipline for lawyers' acts that question the actions or processes of the courts but do not affect client interests. This Court acts as judge, jury, and appellate reviewer in a disciplinary proceeding. The prosecutor, the Disciplinary Commission, relies on this Court for funding and direction. Where the offense consists of criticism of the judiciary, we become the victim as well. This mixed role is thrust upon us by the State Constitution. I accept it, but believe that it demands the utmost restraint in imposing discipline for expression of criticism of the courts. I would require a finding that a lawyer had at least substantial doubt as to the accuracy of a misstated material fact before sanctioning the lawyer for comments on judicial acts or processes. That standard is not met here.

APPENDIX B — OPINION OF THE SUPREME COURT OF INDIANA DATED JANUARY 3, 2003

Supreme Court of Indiana

No. 49S00-0005-DI-341.

In the Matter of Michael A. **WILKINS**.

Jan. 3, 2003

RUCKER, Justice.

Respondent has moved that I disqualify myself from participation in this case. More precisely, he has filed a petition for rehearing from this Court's 3-2 decision sanctioning him for violating Indiana Professional Conduct Rule 8.2(a). In part, respondent seeks rehearing "in order for Justice Rucker to address whether recusal is appropriate in light of his participation on the Court of Appeals' panel in *Michigan Mutual Insurance Company v. Sports, Inc.*, 698 N.E.2d 834, 845 (Ind.Ct.App.1998)." Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 8.

To place respondent's motion in context, a brief summary of the facts is appropriate. In a lawsuit against Michigan Mutual Insurance Company alleging bad-faith denial of insurance coverage, a jury awarded compensatory and punitive damages to Sports, Inc. The trial court entered judgment on the jury's verdict, and on review the Indiana Court of Appeals affirmed the judgment. I was a member of the Court of Appeals at that time, and along with Judges Darden and Garrard I served on the panel assigned to the case. Judge Darden wrote the opinion and Judge Garrard concurred. I concurred in the result—neither joining in the reasoning or rationale of the opinion, nor writing a separate opinion of my own.

Michigan Mutual did not seek rehearing of the Court of Appeals' opinion. Rather, represented by the respondent and an attorney from the State of Michigan, Michigan Mutual filed a petition to transfer in this Court. In the petition respondent asserted that the Court of Appeals' opinion materially misstated the record by making affirmative misstatements of fact. In his supporting brief respondent amplified his assertion with the following statement:

> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.

Br. in Supp. of Appellant's Pet. to Trans. at 1.

> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of

> whether the facts or the law supported its decision).

Id. at n. 2. On March 5, 1999, the Indiana Supreme Court denied appellant's petition to transfer. *Mich. Mut. Ins. Co. v. Sports, Inc.*, 706 N.E.2d 555, 556 (Ind.1999). The Court also entered an order striking Michigan Mutual's brief as a "scurrilous and intemperate attack on the integrity of the Court of Appeals." *Id.* at 555. I joined this Court thereafter on November 19, 1999.

On May 30, 2000, the Disciplinary Commission of the Supreme Court of Indiana filed a complaint against respondent Michael A. Wilkins. Based on the above quoted portions of the Michigan Mutual transfer brief, the Commission alleged that respondent violated Rule 8.2(a) of the Rules of Professional Conduct.[1] A hearing officer was appointed and after conducting a hearing determined that respondent violated the Rule as charged. On June 13, 2002, respondent filed a petition with this Court seeking review of the hearing officer's determination. The five-page petition did not cite the Court of Appeals' opinion in *Michigan Mutual.* In addition to the petition itself, respondent also filed a twenty-seven page supporting brief. Except for two passing references that were inserted in footnotes, respondent again did not cite the Court of Appeals' opinion in *Michigan Mutual. See* Br. in Supp. of Pet. for Review at 2 n. 3, 17 n. 31. Rather, respondent focused on the comments in his 1999 transfer brief to this Court and the substance of the alleged Rule violation.

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[1] The Rule provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Ind. Professional Conduct Rule 8.2(a).

On October 29, 2002, this Court issued a 3-2 per curiam opinion determining that respondent violated Professional Conduct Rule 8.2(a) and imposing a sanction of a thirty-day suspension from the practice of law. *See In re Wilkins*, 777 N.E.2d 714 (Ind.2002) (Shepard, C.J., and Dickson and Rucker, JJ., concurring; Sullivan and Boehm, JJ., dissenting with separate opinions). Thereafter on November 19, 2002, respondent filed a petition for rehearing. For the first time since these proceedings began, nearly a year and a half ago, respondent moves for my recusal. He does not seek my immediate disqualification. Rather, respondent wants me to remain a part of these proceedings long enough to vote on his petition for rehearing and only then cease further participation in this case.

Citing Canon 3(E) of the Indiana Code of Judicial Conduct respondent contends that my recusal "was and is required." Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 11.[2] The Canon provides in relevant part:

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[2] Respondent also cites Canon 2(A) which provides, "[a] Judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Ind. Judicial Conduct Canon 2(A).

(Cont'd)

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

Jud. Canon 3(E)(1)(a). The underlying thrust of respondent's argument is that because I served on the panel whose opinion respondent criticized, I should have disqualified myself sua sponte from hearing his disciplinary matter.

There is no question that a judge is required to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. The Canon demands it. In addressing those concerns the issue has been cast as "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir.1985). As this court has recently stated, the issue "is not whether the judge personally believes himself

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(Cont'd)

In doing so, respondent provides no independent assessment of its applicability. Rather he references the "impartiality of the judiciary" component of this Canon and then shifts to a discussion of "impartiality" as the term appears in Canon 3(E)(1). *See* Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 14-16.

or herself to be impartial, but whether a reasonable person aware of all the circumstances would question the judge's impartiality." *In re Morton*, 770 N.E.2d 827, 831 (Ind.2002).

The facts and circumstances are these. First, I was completely unaware that I had served on the underlying Court of Appeals panel. Neither before the hearing officer nor in his petition to this court for review of the hearing officer's determination did respondent ever mention that I served on the panel. Rather, at every opportunity respondent focused on the substance of the comments that provided the basis for this disciplinary action. That was my focus as well. Respondent does not reveal why he failed before now to bring this matter to my attention. However, citing to several cases in which I served on the Court of Appeals panel and sua sponte decided not to participate once a party sought transfer to this Court, respondent says that it was "a forgone conclusion that Justice Rucker would recuse." Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 9. However, each case respondent refers to in support of this assertion involved a petition to transfer from a case in which I either wrote a separate dissenting opinion, *see Bagnall v. Town of Beverly Shores*, 705 N.E.2d 213 (Ind.Ct.App.1999); or concurred outright in the majority opinion, *see In re Estate of Troxel*, 720 N.E.2d 731 (Ind.Ct.App.1999); *Dullen v. State*, 718 N.E.2d 1237 (Ind.Ct.App.1999); *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.* 714 N.E.2d 1218 (Ind.Ct.App.1999); *United States Gypsum, Inc. v. Ind. Gas Co., Inc.*, 705 N.E.2d 1017 (Ind.Ct.App.1998); *Bosecker v. Westfield Ins. Co.*, 699 N.E.2d 769 (Ind.Ct.App.1998). Unlike a petition to transfer where the Court of Appeals' opinion or decision itself is being challenged, thereby instantly revealing the composition of the panel deciding the case, the matter before this Court was different. The issue before us was not the Court of Appeals' opinion, but rather what the respondent had to say about the opinion. The composition of the panel deciding the opinion was not at all apparent, nor in my view particularly relevant. The comments themselves were at issue; and regardless of the panel members, either the comments were made "with reckless disregard as to [their] truth or falsity concerning the . . . integrity of a judge" or they were not. *See* Prof. Cond. R. 8.2(a).

In addition, by the time respondent's disciplinary matter reached this Court, I had served on the Court of Appeals for nearly nine years. During that period the Court of Appeals issued over fourteen thousand opinions, some of which, obviously, I authored, others of which I served as a member of the panel. Absent the respondent bringing to my attention that I happened to have served on the underlying Court of Appeals panel in this particular case, I simply would have had no reason to assume my involvement. And this is especially so considering that in his brief before this Court challenging the hearing officer's disciplinary ruling, respondent chose to cite to the Court Appeals opinion only in passing in two of forty-five footnotes. Judges cannot be "call[ed] upon . . . to perform the impossible—to disqualify themselves based on facts they do not know." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Here, the connection between the fact that I served on the *Michigan Mutual* panel and the fact that I participated in respondent's disciplinary action is "so attenuated that no judicial officer could reasonably be expected to identify [this] potential for recusal without the issue being raised by counsel." *Nat'l City Bank, Ind. v. Shortridge*, 691 N.E.2d 1210, 1211 (Ind.1998).

Second, respondent's failure to raise the issue of my involvement in the underlying Court of Appeals opinion implies one of three possibilities: (1) the respondent was aware that I had served on the Court of Appeals panel but decided not to press the issue because he was satisfied that I would be impartial in deciding this disciplinary matter; (2) the respondent was aware that I had served on the panel but decided to await the outcome of this Court's decision on his disciplinary matter and then seek recusal if the decision were unfavorable; or (3) the respondent himself was unaware that I had served on the panel. This latter possibility is highly unlikely given that within days of this Court's decision both local and national press were reporting it and specifically referencing my involvement in the underlying Court of Appeals opinion. *See, e.g.*, Kevin Corcoran, *Lawyer's Penalty Criticized*, The Indianapolis Star (Nov. 5, 2002) (attributing a statement to source who said "the case shouldn't have gone against Wilkins, because Justice Robert Rucker had served on the Court of Appeals panel Wilkins criticized. That should have kept Rucker from casting a deciding vote. . . ."), *at* http://www.indystar.com; David L. Hudson, Jr., *Footnote In Mouth: Indiana High Court Suspends Lawyer for Comments in Brief*, ABA Journal (Nov. 15, 2002) (noting "[i]n an unusual twist, Justice Robert D. Rucker, who voted with the 3-2 majority, also served on the appellate panel criticized in Wilkins' brief"), *at* http:// www.abanet.org/ journal /ereport/n15suspend.html; Gary Young, *Footnote Gets A Lawyer Suspended*, National Law Journal (Nov. 11, 2002) (commenting "[t]he case has drawn controversy . . .

because one of the judges who voted for Wilkins' suspension, Justice Robert D. Rucker, served on the Court of Appeals until 1999 and had a hand in the decision that Wilkins criticized"), *at* http:// www.nlj.com.[3]

As for possibility number two, respondent's lack of timeliness in seeking recusal is troubling. "Counsel . . . may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits." *Tyson v. State*, 622 N.E.2d 457, 460 (Ind.1993) (quoting *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir.1986)); *see also* Leslie W. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct* 11 (2d ed.1992) (identifying two primary policy reasons for timeliness in the filing of recusal motions: (i) a party, although aware of facts that may disqualify a judge, may take a chance on obtaining a favorable trial result and then complain only if the result is unfavorable, and (ii) a motion to recuse is disruptive and delays litigation). That leaves possibility number one: respondent was aware that I had served on the Court of Appeals panel but decided not to press the issue because he was satisfied that I would be impartial in deciding this disciplinary matter. If that is in fact the case, then respondent is correct. Nothing has changed except respondent did not receive the result he anticipated.

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[3] An observation by the 2nd Circuit Court of Appeals concerning media exposure is instructive:

> [W]ith regard to the appearance of partiality, the appearance must have an objective basis beyond the fact that claims of partiality have been well publicized. . . . That which is seen is sometimes merely a smokescreen. Judicial inquiry may not therefore be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal. The test, as we have stated, is one of reasonableness, and the appearance of partiality portrayed in the media may be, at times, unreasonable.

In re Aguinda, 241 F.3d 194, 201-02 (2d Cir.2001).

Respondent also insists that apart from questions of partiality under Canon 3E(1), my recusal is nonetheless required because I have "personal knowledge of disputed evidentiary facts" under Canon 3(E)(1)(a). Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 16. Specifically he claims "[a]s one of the three participants in the *Michigan Mutual* panel's deliberations which must have taken place at least before and/or after the oral argument of July 9, 1998, Justice Rucker unquestionably has personal knowledge of the facts bearing upon Mr. Wilkins' statement." *Id.*

It is not at all clear to me exactly which facts the respondent is referring to. His statement was that the Court of Appeals' opinion "is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)." Br. in Supp. of Appellant's Pet. to Trans. at 1 n. 2. If respondent is implying that I participated in a court conference where a part of the discussion involved ruling against his client regardless of the law and the facts, then he is mistaken. More to the point, the question is one of respondent's state of mind and of respondent's conduct. *See, e.g., In re Atanga*, 636 N.E.2d 1253, 1257 (Ind.1994). "What did Respondent know at the time he made the statements . . . ? Did he have a basis upon which to make statements concerning the Court? Did the statements he made challenge the qualifications or integrity of the judge? Were the statements reckless in light of his knowledge and experience?" *Id.* (sanctioning an attorney for violating Rule of Professional Conduct 8.2(a) for among other things referring to a trial judge as ignorant, insecure, and a racist). Here, respondent fails to explain how any "facts" that I possess could have any bearing on his state of mind or further what those facts may be.

I am firmly convinced that I have fairly and impartially decided respondent's disciplinary matter. Even had I been conscious of my involvement in the underlying Court of Appeals opinion, I cannot now say that I absolutely would have disqualified myself from deciding the instant case. After all, as reflected by my "concur in result" vote, although I agreed with the majority's conclusion that the trial court's judgment affirming the jury verdict was correct, I did not agree with the majority's reasoning and rationale in reaching that conclusion. Consequently, I would not have been especially concerned about the respondent's criticism of the opinion.

Nonetheless, I acknowledge that the question is not whether I personally believe I have been impartial. Rather, it is whether a "reasonable person aware of all the circumstances" would question my impartiality. *Morton*, 770 N.E.2d at 831. And in this context a "reasonable person" has been described as "the proverbial average person on the street with knowledge of all the facts and circumstances alleged in the motion to recuse. . . ." *In re Martin-Trigona*, 573 F.Supp. 1237, 1243 (D.Conn.1983). Echoing this sentiment one court has observed "disqualification of a judge is mandated whenever a significant minority of the lay community could reasonably question the court's impartiality." *Pennsylvania v. Druce*, 796 A.2d 321, 327 (Pa.Super.Ct.2002), *appeal granted in part*, 809 A.2d 243 (Pa.2002). In this case there is a possibility, particularly outside of the legal community, that my impartiality could be questioned. *See, e.g.*, *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir.1995) (noting that the average person on the street as "an observer of our judicial system is less likely to credit judges' impartiality than the judiciary"); *In re Mason*, 916 F.2d 384, 386 (7th Cir.1990) (observing that a lay observer would be less inclined to credit a judge's impartiality than other members of the judiciary). Because a judge has a duty to promote public confidence in the impartiality of the judiciary, *Tyson*, 622 N.E.2d at 459, and because "[c]oncerns about public confidence in the judicial system" underlie Canon 3, *id.*, out of an abundance of caution I therefore recuse myself from further involvement in this case. And I do so effective immediately declining respondent's request to consider first his petition for rehearing now pending before this Court.

APPENDIX C — OPINION OF THE SUPREME COURT OF INDIANA DATED FEBRUARY 4, 2003

Supreme Court of Indiana

No. 49S00-0005-DI-341.

In the Matter of Michael A. **WILKINS,**

Respondent.

Feb. 4, 2003

DISCIPLINARY ACTION

ON PETITION FOR REHEARING

DICKSON, Justice.

The respondent in this attorney discipline matter seeks rehearing following our *per curiam* opinion, *Matter of Wilkins*, 777 N.E.2d 714 (Ind.2002), which held that certain remarks in the respondent's brief supporting his petition for transfer in a prior case violated Indiana Professional Conduct Rule 8.2(a) and warranted his suspension from the practice of law for thirty days. His petition requests reconsideration of (1) the application of the First Amendment protection to the offending remarks, and (2) the appropriate sanction to be imposed.

We dispose of these requests largely on the difference between sound advocacy and defamation. Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge's integrity.

Appendix C

I.

We decline to grant rehearing as to the First Amendment issue. Aside from First Amendment considerations, however, we acknowledge that important interests of judicial administration require considerable latitude regarding the content of assertions in judicial pleadings, motions, and briefs. Just as we must seek to preserve the public respect and confidence in the judiciary, in prescribing practice and procedures for the proper administration of justice we must also preserve the right of a party to access and use the judicial system to present a "good faith argument for an extension, modification, or reversal of existing law." Ind. Professional Conduct Rule 3.1. The Comment to Rule 3.1 observes: "[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."

In *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151 (Ind.1987), this Court emphasized the need for an appellate tribunal to use extreme restraint in stifling appellate advocacy: "[W]e cannot fail to recognize that the imposition of punitive sanctions does have significant negative consequences. . . . It will have a chilling effect upon the exercise of the right to appeal. It will discourage innovation and inhibit the opportunity for periodic reevaluation of controlling precedent." *Id.* at 152. Concluding that "we must invite, not inhibit, the presentation of new and creative argument[,]" we held in *Orr* that "punitive sanctions may not be imposed to punish lack of merit unless an appellant's contentions and argument are utterly devoid of all plausibility." *Id.* at 153.

These considerations are limited, however, by Indiana Professional Conduct Rule 8.2(a), which provides in relevant part: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge. . . ." Our *per curiam* opinion noted that the respondent's brief suggested that the decision of the judges on the Court of Appeals resulted from unethical motivations. The offending language consisted of footnote 2 to his brief, stating:

> Indeed, the [Court of Appeals] Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

Wilkins, 777 N.E.2d at 716.

The language of footnote 2 does not merely argue that the Court of Appeals decision is factually or legally inaccurate. Such would be permissible advocacy. The footnote goes further and ascribes bias and favoritism to the judges authoring and concurring in the majority opinion of the Court of Appeals, and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome. These aspersions transgress the wide latitude given appellate argument, and they clearly impugn the integrity of a judge in violation of Professional Conduct Rule 8.2(a). We decline to revise our determination that the respondent violated Rule 8.2(a).

II.

We grant rehearing in part, however, as to the particular issue of the appropriate sanction to be imposed for this violation. Upon further reconsideration we are persuaded to revise the nature of the discipline.

As noted in our *per curiam* opinion, the respondent timely contacted the offices of both the Chief Judge of the Indiana Court of Appeals and the Chief Justice of Indiana, and thereafter wrote to both the Chief Judge and the Chief Justice "offering to apologize in person and to acknowledge that the footnote was 'overly-aggressive and inappropriate and should never have made its way into our Brief.' " *Wilkins*, 777 N.E.2d at 716.

We also give renewed consideration to the Hearing Officer's findings that the respondent has maintained an outstanding and exemplary record for honesty, integrity, and truthfulness among his peers in the Bar, and among members of the judiciary. This warrants substantial weight. Furthermore, although the respondent's role in signing and filing the brief constitutes joint responsibility pursuant to Indiana Admission and Discipline Rule 3(2)(d), we note that the language of the footnote was not authored by the respondent but by an out-of-state co-counsel.

We find unpersuasive, however, assertions that some other prominent American lawyers or judges may have engaged in similar techniques of argument. Such unfortunate occasional resorts to uncivil dialogue should not be our standard for acceptable Indiana pleading and practice.

Upon rehearing as to the sanction, we conclude that the respondent's penalty in this disciplinary proceeding should not consist of a period of suspension but rather only the public reprimand already effected by the content of our initial *per curiam* opinion.

Rehearing is granted in part and denied in part, and the respondent's sanction is revised from a thirty-day suspension from the practice of law to a public reprimand. Because we are only granting rehearing on a particular point, rather than a general rehearing, our *per curiam* opinion remains in effect except as modified herein. *See Griffin v. State*, 763 N.E.2d 450, 451 (Ind.2002).

SHEPARD, C.J., concurs; BOEHM, J., concurs in result with separate opinion; RUCKER, J., not participating; SULLIVAN, J., dissents, believing respondent's conduct was speech protected by the First Amendment and so no sanction is permissible. *See In re Wilkins*, 777 N.E.2d 714 (Ind.2002) (Sullivan, J., dissenting).

BOEHM, Justice, concurring in result.

I continue to adhere to the view that the respondent did nothing that this Court should find sanctionable. Specifically, I believe the statements attributed to the respondent are protected by both the First Amendment to the Constitution of the United States and by Article I, Section 9 of the Indiana Constitution. Even if these statements were not constitutionally protected, for the reasons given in my original dissent, I would not find them to violate the Rules of Professional Responsibility. Therefore, I would grant rehearing on all aspects of the Court's initial opinion. However, there is no majority to grant rehearing on the sanction unless a public reprimand remains in place. For that reason, I concur in the result to impose a public reprimand rather than leave in place the thirty-day suspension already imposed.

The respondent's petition to rehear this matter arrives in an extremely unusual procedural posture. Although the full court addressed the case initially, only four Justices remain to consider the petition to reconsider. If a majority votes to grant rehearing, the effect is to recall the former opinion, and Wilkins' case would be before us "as if it had never been decided." 2 Arch N. Bobbitt, *Indiana Appellate Practice and Procedure*, § 62:11, at 625 (1972); *see also Bally v. Guilford Township Sch. Corp.*, 234 Ind. 273, 275, 126 N.E.2d 13, 15 (1955); *Booher v. Goldsborough*, 44 Ind. 490, 496 (1873); Terrance L. Smith and Anthony DeBonis Jr., *Appellate Handbook for Indiana Lawyers*, § 19:8, at 302 (1987). If rehearing is granted on a single issue—in this case the proper sanction—the original opinion stands as to all other issues, and only the sanction is vacated. *Griffin v. State*, 763 N.E.2d 450 (Ind.2002).

The votes of the Chief Justice and Justice Dickson are to grant rehearing as to the sanction only, and to impose a public reprimand. Justice Sullivan and I would vote for no sanction at all. But if neither of us joins in the result reached by Justice Dickson and the Chief Justice, we have no majority to grant rehearing as to any aspect of the original opinion and Wilkins' thirty-day suspension stands. Lewis Carroll would love that result: half the Court believes no sanction is appropriate, and half would impose a small sanction, so the result is a major penalty. Only those who love the law could explain that to their children. To free parents everywhere from that burden, I concur in the result of granting rehearing as to the sanction and reducing it to a public reprimand.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION DATED APRIL 3, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NO. MISC 02-106-IP

IN THE MATTER OF:

MICHAEL A. WILKINS

ORDER

The Chief Judge having considered the respondent's Return to Order to Show Cause now finds that the Respondent has shown cause why this Court should not impose discipline identical to that imposed by the Indiana Supreme Court.

Respondent's Request for Review and Determination En Banc and Request for Oral Argument are hereby DENIED.

The Chief Judge finds that discipline from this Court, in addition to the discipline assessed by the Indiana Supreme Court, is not necessary under the facts and circumstances of this case.

IT IS SO ORDERED this 3rd day of April, 2003.

s/ Larry J. McKinney
LARRY J. MCKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

2

Supreme Court, U.S.
FILED
JUL 10 2003
OFFICE OF THE CLERK

No. 02-1616

In The
Supreme Court of the United States

◆

MICHAEL A. WILKINS,

Petitioner,

v.

DISCIPLINARY COMMISSION OF
THE SUPREME COURT OF INDIANA,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The Supreme Court Of Indiana

◆

BRIEF IN OPPOSITION

◆

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26 pp

QUESTION PRESENTED

Whether, consistent with the First Amendment, a lawyer may be publicly reprimanded for impugning the integrity of a court in a brief without having a factual basis for doing so.

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STATEMENT OF THE CASE

Indiana attorney Michael Wilkins was publicly reprimanded by the Indiana Supreme Court in a lawyer discipline case for making groundless statements accusing judges of the Indiana Court of Appeals of deciding a case to achieve a desired outcome in conscious disregard of the facts and law. Wilkins' accusatory statements were contained in a brief to the Indiana Supreme Court. Advocacy speech by lawyers appearing on behalf of clients is constrained in many ways. Given the important state interests involved in fostering broad public respect for the judiciary, it does not violate the First Amendment for the states to insist that controls on in-court advocacy speech include a prohibition against impugning judicial integrity with no basis in fact.

Wilkins was reprimanded for making the following accusation against the court of appeals in a brief supporting a petition seeking supreme court review of that court's decision in *Michigan Mutual Ins. Co. v. Sports, Inc.*, 698 N.E.2d 834 (Ind.App. 1998), *trans. denied*, 706 N.E.2d 555 (Ind. 1999):

> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

Pet. App. at 3a. As a result of the offending footnote, the supreme court struck the brief as "[a] scurrilous and intemperate attack on the integrity of the Court of Appeals," 706 N.E.2d at 555, but nevertheless reviewed the petition for transfer on its merits and denied the same. *Id.*

The only authoritative basis for the supreme court's action in striking the brief could have been Ind. R. App. P. 42.[1] Contrary to Wilkins' assertion, Pet. at 3 n. 3, it did not exercise its contempt jurisdiction when it struck the brief.[2]

Thereafter, the Indiana Supreme Court Disciplinary Commission filed a professional discipline complaint against Wilkins, alleging that the statements in the *Michigan Mutual* brief violated Indiana Rule of Professional Conduct 8.2(a).[3] Wilkins did not file an answer or raise any affirmative defenses in a responsive pleading in the discipline case. He formally raised his constitutional defense for the first time in his trial brief, filed just more than a week before trial and after final witness and exhibit lists had been submitted. Respondent Michael Wilkins' Trial Brief, pp. 19-22. In discussing the First Amendment argument in his trial brief, Wilkins did not assert that that the burden of proving falsity of the statements in the *Michigan Mutual* brief fell on the Disciplinary Commission or that the Disciplinary Commission's charge of reckless disregard had to be proved by a subjective, rather than an objective standard. Instead, his First Amendment claim focused on the contention that footnote 2 was protected speech because it was a statement of pure opinion, not a statement of fact that was provably true or false.

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[1] Ind. R. App. P. 42 states: "Upon motion made by a party within the time to respond to a document, or if there is no response permitted, within thirty (30) days after the service of the document upon it, or at any time upon the court's own motion, the court may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter."

[2] Thus, Wilkins is incorrect when he states, Pet. at 5, that the supreme court's reprimand was a second punishment.

[3] Ind. Prof. Cond. R. 8.2(a) states: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." ABA Model Rule of Professional Conduct 8.2(a) is identical.

After the hearing officer issued his findings of fact and conclusions of law, Wilkins petitioned the Indiana Supreme Court to review the case. When a party petitions for review, the Indiana Supreme Court conducts a de novo review, albeit one limited to the factual record developed in front of the hearing officer. *Matter of Hefron*, 771 N.E.2d 1157, 1159 (Ind. 2002). In his petition for review and supporting brief, Wilkins, again, did not argue that the First Amendment required the Disciplinary Commission to shoulder the burden of proving the falsity of the statements in footnote 2 or that the reckless disregard standard had to be a subjective one. Instead, he concentrated his First Amendment challenge on the claim that the statements in footnote 2 were "not capable of being true or untrue as a matter of fact." Brief in Support of Petition for Review of the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation, p.13.

In its decision, the Indiana Supreme Court found that Wilkins' footnote 2 violated Ind. Prof. Cond. R. 8.2(a). The court found that other "heavy-handed" statements in the brief did not violate Prof. Cond. R. 8.2(a) because they roughly paraphrased legitimate grounds for seeking review of lower court decisions. These statements charged that the lower court decision "erroneously and materially misstates the record by making affirmative misstatements regarding the evidence" and that the decision "is quite disturbing" because it is "replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point." Pet. App. at 6a-7a.

The statements in the footnote, however, violated Prof. Cond. R. 8.2(a) "because they were made with reckless disregard as to the truth or falsity concerning the integrity" of the lower court judges. Pet. App. at 7a. In rejecting Wilkins' claim that his statements were protected by the First Amendment, the court relied on Rule 8.2's concern "with preserving the public's confidence in the administration of justice." Pet. App. at 8a. Wilkins cited no evidence in the appellate record to support the footnote 2 accusation, and there was none. If Wilkins had evidence of improper judicial conduct outside the record, it could have been presented to the Judicial Qualifications Commission, Indiana's body charged with enforcement of the Code of Judicial Conduct. Pet. App. at 9a.

The court also held that the statements were unprotected because they were made in an appellate brief governed by Indiana's appellate rules. The rules require that briefs be "supported by cogent reasoning, citations to authorities, statutes or the record." Pet. App. at 9a, *quoting*, Ind. R. App. P. 46(A)(8)(a). Whether a lawyer's statement in an appellate brief makes an accusation that impugns judicial integrity or addresses some other topic, if it is factually unsupported in the record, it is not allowed by Indiana's appellate rules. Ind. R. App. P. 46(A)(6)(a).

In a reciprocal disciplinary proceeding in the local federal district court, the court declined to additionally reprimand Wilkins because discipline in addition to that assessed by the Indiana Supreme Court was "not necessary." Pet. App. at 35a. Wilkins' implication, Pet. at 9, that the federal court declined to assess a further sanction based on the First Amendment arguments Wilkins presented to that court is wrong.

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REASONS FOR DENYING THE PETITION

The questions presented by the petition share in common the single question whether the constitutional standard for protecting speech in the defamation context established by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny applies with full and equal force to a professional disciplinary proceeding resulting in the reprimand of a lawyer who makes groundless statements impugning judicial integrity during a court proceeding.

The Indiana Supreme Court, consistent with prior Indiana authority, has expressed solicitude for legitimate lawyer advocacy, but has not fully embraced *New York Times* as the correct expression of the limits to state regulation of in-court lawyer speech. The clear consensus of state high courts and federal courts of appeals is that a different standard is warranted because of the unique role of lawyers acting as officers of the court and the state's compelling interest in fostering public confidence in the fundamental integrity of judicial processes. The decision of the Indiana Supreme Court in this case is consistent with those other cases. None of the lower court authorities cited by Wilkins fully accepts *New York Times* and the cases interpreting it as the First Amendment standard for regulating in-court lawyer speech. There is no split of authority meriting the Court's review.

This Court has given deference to the traditional state supreme court function of determining who is fit to practice law and what lawyer conduct is worthy of regulation. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982). Its treatment of claims by lawyers held professionally accountable for impugning judicial integrity is no exception. See, *Florida Bar v. Ray*, 797 So.2d 556 (Fla. 2001), *cert. denied*, 535 U.S. 930 (2002); *Idaho State Bar v. Topp*, 925 P.2d 1113 (Idaho 1996), *cert. denied*, 520 U.S. 1155 (1997); *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181 (Ky. 1996), *cert. denied*, 519 U.S. 1111 (1997); *Matter of Garringer*, 626 N.E.2d 809, 813 (Ind.), *cert. denied*, 513 U.S. 826 (1994); *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, *cert. denied*, 502 U.S. 1009 (1991); *Matter of Westfall*, 808 S.W.2d 829 (Mo.), *cert. denied*, 502 U.S. 1009 (1991); *In re Graham*, 453 N.W.2d 313 (Minn. 1990), *cert. denied*, 498 U.S. 820 (1990); and *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981).

I. The First Amendment claim was not fully and timely raised below.

Wilkins argues that the First Amendment standard to be applied to in-court statements by lawyers who impugn judicial integrity is the standard set forth in *New York Times v. Sullivan* and its progeny. In *New York Times*, this Court held that the constitutional standard for recovery of defamation damages by a public official is that the party seeking damages must prove "that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. Later cases clarified that the *New York Times* standard, as applicable to statements made about public officials, public figures and nonpublic persons who are involved with important public questions, is comprised of three elements. First, proof of actual malice demands a showing by the damage claimant that the speaker had either actual knowledge of falsity or was subjectively reckless regarding the veracity of the statement in question. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *St. Amant v. Thompson*, 390 U.S. 729, 731 (1968). Second, in reckless disregard cases, the damages claimant must still carry the affirmative burden of proving that the statement in question was actually false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986). Third, allegedly defamatory speech may not be punished if it makes assertions that cannot be reasonably interpreted as stating facts or are not susceptible of being proved true or false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990).[4]

Ind. Admis. Disc. R. 23(14)(a), as it was in effect at the time the disciplinary charge was filed, stated in relevant part: "The case shall be heard on the complaint and an answer which may be filed by the respondent within thirty (30) days after notice of the filing of the complaint. An answer, if filed, may assert any legal defense." Wilkins opted to not answer the complaint and, accordingly, did not raise the First Amendment defense in a responsive pleading. Rather, he formally raised a First Amendment defense for the first time in his trial brief, filed just more than a week before trial and after final witness and exhibit lists had been filed. Respondent Michael Wilkins' Trial Brief, pp. 19-22. Even then, Wilkins did not assert that the First Amendment demanded that the Disciplinary Commission bear the burden of proving falsity. Nor did Wilkins make a First Amendment claim that in a reckless disregard case the standard must be subjective, rather than objective. Instead, he confined his First Amendment claim to the contention that statements of opinion that are not susceptible of being proved true or false enjoy constitutional protection. Even in his petition to the Indiana Supreme Court for review of the hearing officer's findings of fact and conclusions of law, Wilkins restricted his First Amendment argument to the claim that footnote 2 was protected speech because it was not provably true or false.

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[4] The standard of proof to be borne by the damages claimant is "clear and convincing evidence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). That is not an issue here, because in Indiana lawyer discipline actions the burden of proof is on the Disciplinary Commission to prove its claims by clear and convincing evidence. Ind. Admis. Disc. R. 23(14)(h).

Part of Wilkins' argument includes the claim that the Disciplinary Commission had the burden of proving the actual falsity of the factual assertions in footnote 2. Pet. at 6. The state of Indiana law at the time of the hearing on the merits in *Wilkins* was that in a reckless disregard case the lawyer may not attempt to prove for the first time during his discipline case that the earlier statement was unwittingly true; hence, when a statement was recklessly made, an after-the-fact attempt to decipher the truth of the offending statement is unavailing. *Matter of Atanga*, 636 N.E.2d 1253, 1258 (Ind. 1994); *Garringer*, 626 N.E.2d at 813. In sum, the Indiana position is that a lawyer who makes a statement impugning judicial integrity after making a reasonable investigation will not be held professionally accountable, even if the statement should turn out to be untrue. Conversely, if a lawyer groundlessly makes such a statement, the lawyer will be held professionally accountable even if, by dumb luck, the statement should turn out to be true. The inquiry, under the Indiana scheme, is on the quality of the lawyer's inquiry at or before the time he makes the statement. In light of the established Indiana law on this question, by failing to timely raise his burden of proof claim in a responsive pleading or otherwise in advance of the hearing on the merits, Wilkins deprived the Disciplinary Commission of fair notice of the extent of his constitutional arguments so that the Disciplinary Commission could have undertaken to prove the falsity of the factual assertions contained in footnote 2. By failing to raise his First Amendment burden of proof claim at all in the state court, Wilkins did not timely raise that aspect of his constitutional question, and so it is not properly before the Court for review. Sup. Ct. R. 14.1(g)(i). Likewise, because he failed to timely raise his First Amendment claim that reckless disregard is to be measured subjectively, not objectively, that question, too, is not properly before the Court. *Id.*

The practical effect of placing the burden of proving falsity on the lawyer disciplinary agency in reckless disregard cases will be to require those agencies, even when the attack on judicial integrity was groundless, to hail respected judges into court to be examined and cross-examined about, for example, their internal thought processes, as in this case, or to disprove that they consciously concealed federal crimes. See, e.g., *Garringer*, 626 N.E.2d at 811. Indeed, at least in the case of federal judges, this might be impossible. See, e.g., *Matter of Cook*, 49 F.3d 263, 265 (7th Cir. 1995) ("[T]he [Illinois Attorney

Registration and Disciplinary Commission] issued a subpoena requiring [federal district court] Judge Rovner to appear and submit to cross-examination about the proceedings in her court and the rationale for her findings. Not surprisingly, she declined, observing that federal judges speak through their opinions, and that their mental processes are not subject to examination.")

II. There is no conflict between this case and similar cases decided by federal courts of appeals and other state courts of last resort.

In declining to fully extend *New York Times* and its progeny to in-court lawyer speech that impugns judicial integrity, the Indiana Supreme Court acted consistently with cases decided by the other state high courts and federal courts of appeals. Unquestionably, lawyer speech in this context enjoys First Amendment protection, but the lower courts universally share the view that it should not be identical to the standard that applies to ordinary citizen speech in public about persons or matters of public concern. The cases relied upon by Wilkins do not support his claim that there is a split in lower court authority.

The organizing principle underlying the numerous lower court decisions in this area is that a different standard of protection is warranted in in-court speech cases because of the special role played by lawyers in the administration of justice. The lower courts have consistently recognized the need to strike an appropriate balance between the free speech rights of lawyers and the responsibility of legal advocates to eschew unfounded and reckless attacks on the integrity of the judicial system.

Most of the cases relied upon by Wilkins in support of his claim of a conflict in lower court authority are factually distinct from this case because they deal with lawyer speech to news media or in some other out-of-court setting. See, *Topp*, 925 P.2d at 1116 (interview with local news media); *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1437-38 (9th Cir. 1995) (statements to and advertisement in local newspaper and statement to publisher of judicial almanac); *Westfall*, 808 S.W.2d at 837 (interview with local television station); *Holtzman*, 78 N.Y.2d at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41 (release to news media of letter to chair of public policy taskforce); *State ex rel. Oklahoma Bar Association v. Porter*, 766 P.2d 958 (Okla. 1988) (statements to local news media); *Committee on Legal Ethics of West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W. Va. 1988) (statements to local newspaper); *Louisiana State Bar Ass'n v. Karst*, 428 So.2d 406, 409 (La. 1983) (letter to and advertisement in local newspapers); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d at 168 (press conference to local media); *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 431 (Tex. 1974) (letters to the editor of local newspaper). *In re Palmisano*, 70 F.3d 483, 485 (7th Cir. 1995) was a hybrid case, where the lawyer made statements impugning judicial integrity in motions to courts and in correspondence with administrative officials and prosecutors; as was *Graham*, 453 N.W.2d at 315, where the lawyer impugned judicial integrity in court filings and in correspondence to a United States Attorney and a federal appeals court judge. In fact, *Semaan* specifically noted that its willingness to use *New York Times* as the standard was limited to "utterances made outside the course of judicial proceedings." 508 S.W.2d at 432-33. *Douglas*, relying on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), also explicitly differentiated out-of-court lawyer speech from in-court statements. 370 S.E.2d at 332.

The balance of competing state interests is very different when lawyers speak out-of-court as citizens versus when they formally act as officers of the court by addressing tribunals on behalf of their clients. Indeed, the very foundation of Fed. R. Civ. P. 11 and its state analogues rests on the notion that courts have considerable leeway to regulate the conduct of counsel appearing before them. Rule 11-type standards demand no less of counsel than Prof. Cond. R. 8.2(a) – "an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b). The logic of Wilkins' First Amendment position is that courts are so restricted in their ability to regulate in-court lawyer speech that it was a violation of his or his client's constitutional rights for the Indiana Supreme Court to even strike his *Michigan Mutual* brief pursuant to Ind. R. App. P. 42.

The cases cited by Wilkins that deal with in-court statements uniformly apply a different standard than *New York Times* because of the state's compelling interest in shielding the judicial system from unfounded attacks on its integrity by advocates. In *Ray*, 797 So.2d at 559 (applying an objective standard to the reckless disregard branch of the actual malice standard), the Florida Supreme Court rejected a full-fledged application of the *New York Times* standard to in-court lawyer speech because of the compelling interest states have in "preserv[ing] public confidence in the fairness and impartiality of our system of justice." *Id.* at 558-59. See also, *Graham*, 453 N.W.2d at 321-22 (applying an objective standard to the reckless disregard branch of the actual malice standard). Without explicitly discussing the applicability of the *New York Times* standard, the Kentucky Supreme Court has similarly given important weight to the state's interest in protecting public confidence in the integrity of the judicial system by regulating groundless, in-court lawyer speech. *Waller*, 929 S.W.2d at 183 (referring to judge in a pleading as a "lying incompetent ass-hole"). Without specifically discussing the *New York Times* standard, in *In re Frerichs*, 238 N.W.2d 764, 767 (Iowa 1976), the Iowa Supreme Court, relying on language from Justice Stewart's concurring opinion in *In re Sawyer*, 360 U.S. 622, 646-47 (1959), stated that lawyers, because of their professional role, are properly held to a different standard when making in-court attacks on the integrity of the judicial system than are members of the general public, and rejected subjective intent as the proper measure of the lawyer's conduct. *Id.* at 770.

Wilkins points to *In re Green*, 11 P.3d 1078 (Colo. 2000) as a case that supports the view that the *New York Times* standard fully applies to in-court lawyer speech. Pet. at 16. This mischaracterizes the case. The *Green* court looked to the *New York Times* standard only by analogy and to support its finding that the lawyer's statements were pure opinion and not statements of fact amenable to being proved true or false. The *Green* court explicitly avoided reaching the question whether the reckless disregard standard ought to be objective or subjective. *Id.* at 1086. The court acknowledged, however, the numerous authorities holding that the reckless disregard test for lawyers should be governed by an objective standard. *Id.* at 1086 n. 7.

It is not just state high courts that have recognized the importance of incorporating into the First Amendment calculus consideration of the special role of lawyers and the state interest in preserving the public's respect for judicial institutions. In *United States District Court for Eastern Dist. of Washington v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993), the court of appeals held that the First Amendment reckless disregard standard is an objective one when applied to in-court speech. See also, *Yagman*, 55 F.3d at 1437-38. The court of appeals in *Palmisano* also held that the *New York Times* standard is not fully applicable to in-court lawyer speech to the same extent as it applies to discourse about public issues and personages. "[T]he Constitution does not give attorneys the same freedom as participants in political debate." 70 F.3d at 487.

Contrary to Wilkins' claim, there is not a split of authority on the question whether in-court lawyer speech that impugns judicial integrity enjoys First Amendment protection under the unalloyed standard developed by this Court in *New York Times* and its progeny. Most of the cases he relies upon to illustrate a split of authority arise in the very different factual context of out-of-court lawyer speech to the news media or in other unrestricted public forums. The balance of the cases he relies upon uniformly recognize that a different First Amendment standard applies when lawyers make groundless, in-court statements that impugn judicial integrity.

III. The Indiana Supreme Court did not reject Wilkins' claim that there is a cognizable distinction under the First Amendment between statements of fact and statements not provably true or false. It merely disagreed that footnote 2 was not a statement of fact.

In *Milkovich*, this Court rejected the artificial distinction between statements of fact and statements of opinion as a helpful demarcation between constitutionally restrainable versus unrestrainable speech. Rather, because statements of fact can be readily cloaked in statements of opinion, the focus must be on the susceptibility of a statement to be proved true or false or whether it is a statement, even by implication, of fact at all. 497 U.S. at 19-20. Contrary to Justice Sullivan's dissent in *Wilkins*, Pet. App. at 12a, Wilkins' statement in footnote 2 was not mere rhetorical hyperbole incapable of being proved true or false. Rather, it was a statement of fact, thinly veiled by the pseudo-speculative, introductory language: "one is left to wonder whether. . . . " This transparent veneer of speculation gives footnote 2 as little constitutional cover as does the statement, "In my opinion, John Jones is a liar." *Id.* at 19.

Wilkins' statement of fact was that the court of appeals judges in *Michigan Mutual* were "determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision.)" Footnote 2 was no less a statement of fact merely because it alleged facts that were internal to the thought processes of the judges. Nor was it a statement that was inherently unprovable as true or false, such as would be, for example, a statement that the court of appeals' opinion imposes unjustifiable risks on casualty insurers. Were statements about state of mind inherently unprovable, it would be futile in our judicial system to attempt proof of criminal scienter; yet it happens every day. Indeed, in *Milkovich*, this Court held that an accusation of perjury, which contains an element of criminal scienter, is "susceptible of being proved true or false." *Id.* at 21.

Neither in *Wilkins* nor elsewhere has the Indiana Supreme Court rejected Wilkins' claim that *Milkovich* protects statements that are not factual in nature or are not provably true or false. It implicitly disagreed with the premise of Wilkins' argument that footnote 2 should enjoy the First Amendment protection afforded by *Milkovich* as a statement not susceptible of being proven true or false. "The language of footnote 2 does not merely argue that the Court of Appeals decision is factually or legally inaccurate. Such would be permissible appellate advocacy. The footnote goes further and ascribes bias and favoritism to the judges authoring and concurring in the majority opinion of the Court of Appeals, and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome." *Wilkins*, Pet. App. at 30a. Thus, "the necessary effect of the judgment" of the Indiana Supreme Court was not to deny Wilkins' claim under *Milkovich*. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Whether the Indiana Supreme Court was right or wrong to treat footnote 2 as a statement of fact does not raise a substantial federal question that makes this case appropriate for Supreme Court review. Unless *all* lower court decisions determining that a statement is one of fact that is verifiably true or false are sufficiently important to merit Supreme Court review, there is nothing in the Indiana Supreme Court's decision that justifies granting certiorari.

IV. Because of the state's compelling interest in fostering respect for the courts, in-court lawyer speech is not entitled to the same protection as public speech by citizens about persons and issues of public import.

This Court has never held that the constitutional standard articulated in *New York Times* and its progeny is the constitutional measure of all speech by all citizens in every context. Instead, the precise constitutional balance must be struck by taking into account other legitimate and compelling state interests that compete with the important state interest in encouraging public debate on matters of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974).

Lawyers, as legal representatives, are not like other citizens. They are granted a monopoly over the right to act as attorneys at law on behalf of their principals in court proceedings. Lawyers are required to acknowledge from the outset the special responsibilities that accompany their unique status. In Indiana's oath of attorneys, similar to the oath taken by lawyers in many states, new lawyers commit to "maintain the respect due to courts of justice and judicial officers. . . . " Ind. Admis. Disc. R. 22.[5] Lawyers, as members of a regulated profession, are different in many ways from ordinary citizens. To cite just one example, parties to litigation may communicate directly with each other, notwithstanding the fact that they are represented, but a lawyer may not speak to a represented party without the consent of opposing counsel. Ind. Prof. Cond. R. 4.2.[6]

Especially in civil litigation, the court system exists to resolve disputes between private litigants that cannot be peaceably resolved in some other setting. The courts are a heavily subsidized and overburdened public resource dedicated to resolving private disputes. So statements to courts by lawyers are not the same as statements made to the world on the sidewalk in front of the courthouse or in an advertisement in a newspaper. The rough and tumble of political debate on issues of public import is not a model that accurately reflects the controlled and deliberative process by which judicial decisions are and should be made. By availing themselves of the resources of the court system for the benefit of their clients, lawyers knowingly accept myriad limits on their speech imposed by procedural rules governing trials and appeals.

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[5] While it is true that judges should be able to thrive in a "hardy climate," *New York Times*, 376 U.S. at 273 (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)), they should not have to thrive in an unfair one. Because judges are human, the quality of justice may suffer when they are bombarded with unfounded ad hominem attacks.

[6] ABA Model Rule of Professional Conduct 4.2 is substantially the same.

In addition to the state's interest in regulating the way in which evidence and arguments are presented to courts, the state also has a compelling interest in protecting the court system from being held up to groundless criticism because of its interest in preserving "public confidence in the fairness and impartiality of the system of justice."[7] *Florida Bar v. Ray*, 797 So.2d at 558-59. Indeed, because of their intimate knowledge of the workings of the system of justice, lawyer commentary about courts and judges will be given greater weight by the public than statements by outsiders.

The court system plays a central role in the functioning of civil society. It exists, in no small part, to provide a means for the peaceful resolution of disputes. In order for courts to effectively discharge their responsibility, they must enjoy the respect of the litigants who come before them, for if judicial pronouncements are widely held to be corrupt, we are little better off than if we had no court system at all. Of necessity, courts must heavily rely upon the inherent force of their pronouncements and the willingness of litigants to voluntarily comply. That is why unfounded speech that has the effect of eroding the integrity of the courts in the eyes of the public is so insidious. Lawyers, as officers of the courts and integral actors in the business of the courts, can readily plant the seeds of public cynicism about the integrity of the system of justice if they are allowed the unfettered ability to make groundless statements that erode public confidence in the court system.

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[7] It is true that it also protects public confidence in judicial institutions when judicial corruption is exposed and punished. But that laudatory goal is not furthered by reckless allegations that judges have abandoned their ethical duties and decided cases without regard to the facts and the law. See, *Palmisano*, 70 F.3d at 487.

We do not wish to overstate our point. The government is certainly not free to arbitrarily and capriciously limit what lawyers may say when acting as advocates for their clients and causes. The speech of advocates in court proceedings has to be robust in order for our adversarial system to flourish. The Indiana Supreme Court has championed this view:

> [W]e cannot fail to recognize that the imposition of punitive sanctions does have significant negative consequences. . . . It will have a chilling effect upon the exercise of the right to appeal. It will discourage innovation and inhibit the opportunity for periodic reevaluation of controlling precedent. . . . [W]e must invite, not inhibit, the presentation of new and creative argument. . . . "

Orr v. Turco Mfg. Co., Inc., 512 N.E.2d 151, 152-53 (Ind. 1987), *quoted in Wilkins*, Pet. App. at 29a. Indeed, the Indiana Supreme Court held that all argument in the

Michigan Mutual brief with the exception of footnote 2 was, while perhaps "heavy-handed," not a violation of Ind. Prof. Cond. R. 8.2(a). *Wilkins*, Pet. App. at 7a.

The issue is whether the limits of constitutional protection for in-court lawyer statements must be congruent with the constitutional standard applicable to citizen speech about persons or matters of public interest. Because of the specialized and unique role played by lawyers in the administration of justice, the standard should not be the same.

◆

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 02-1616

IN THE

Supreme Court of the United States

MICHAEL A. WILKINS,

Petitioner,

v.

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF INDIANA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA**

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Commission's Brief presents no reason to deny the writ. It begins by misrepresenting the record and ends by misrepresenting that Part I of the opinion on rehearing by two justices with two dissents in *Wilkins IV*, displaced the 3-2 Per Curiam decision of *Wilkins I* (App. 1a-12a & 29a-30a). In between, the Commission attempts to obscure the many splits among the state high courts on the applicability of *New York Times*; *Garrison*; and *Milkovich* to protect lawyer advocacy.[1] In short, the First Amendment issues were raised, *repeatedly*,[2] there are multiple wide splits among the state high courts and a federal circuit making the constitutional issues raised by Petitioner ripe for consideration by this Court, and *Wilkins I* (unaffected by the rehearing opinion Part I, *Wilkins IV*) totally ignored both *New York Times* and *Milkovich*.

I. *Misrepresentations That Questions Were Not Presented Below.*

The Commission's assertions that the First Amendment questions, presented here, were not raised below (an assertion the Commission did not make before the Hearing Officer, on the Petition for Review or on the Petition for Rehearing) are bald misstatements. The two dissenters in *Wilkins I* belie the Commission's assertions (App. 12a-15a). The dissents expressly adopted Wilkins' First Amendment arguments that footnote 2 was but an opinion incapable of being proven untrue by the charger or that a subjective actual malice standard was required, and was therefore protected speech under the First Amendment.

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[1] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. State of Louisiana*, 379 U.S. 64 (1964); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

[2] Due to the Commission's misstatements, the portions of the Trial Brief, Petition For Review and Petition For Rehearing are set forth in the Supplemental Appendix submitted herewith.

Contrary to the Commission's mischaracterization of the Record,[3] the *New York Times* subjective/actual malice standard was repeatedly raised:

1. initially in the trial brief before the Commission;[4]

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[3] The Commission states:

> Even then [in the trial brief] Wilkins did not assert . . . nor did Wilkins make a First Amendment claim that . . . the standard must be subjective . . . Even in its petition to the Indiana Supreme Court for Review . . . Wilkins restricted his First Amendment argument that footnote 2 was protected speech because it was not provably true or false.

(Brief, p. 8) The same misrepresentation is scattered throughout the Commission's statement of the case: "In discussing the First Amendment arguments, Wilkins did not assert . . . or that the Disciplinary Commission's charge of reckless disregard had to be proved by subjective rather than an objective standard." (Brief, p. 3). And further: "In his Petition for Review and supporting brief, Wilkins, again, did not argue . . . that the reckless disregard standard had to a subjective one." (Brief, p. 3)

[4] Petitioner's Trial Brief before the Indiana Commission, the first matter responsive to the Complaint as no answer was required under the Disciplinary Rules, specifically requested that the hearing officer and Indiana Supreme Court revisit its holding in *In Re Terry*, 271 Ind. 499, 394 N.E.2d 94 (1979), in which the Indiana Supreme Court had declined to apply the *New York Times* actual malice test to charges of attorney misconduct, echoing Indiana Justice Sullivan's invitation for such a reconsideration in *In re Atanga*, 636 N.E.2d (Cont'd)

2. then in the Petition for Review (*de novo*) to the Indiana Supreme Court, which expressly challenged the hearing officer's proposed decision as contrary to the First Amendment's requirement of actual malice;[5] and

3. again in the Petition for Rehearing which challenged the Per Curiam Opinion (*Wilkins I*) for "failing to adopt the First Amendment *New York Times* standard . . . by failing to apply a subjective standard;"

The Commission never at any stage contended that the issue had not been timely or properly raised.

(Cont'd)

1253, 1259 n.1 (Ind. 1994). After citing and discussing both *Terry* and *Atanga*, Petitioner stated in his trial brief: "Mr. Wilkins contends that the charges in this case demonstrate that Indiana should indeed revisit the *Terry* opinion and afford attorneys greater constitutional protections in criticizing judicial opinions, if not the judiciary itself, as set forth below." Supp. App. 2a; and *see* p. 5a, also requesting that the holding in *Terry* be reconsidered; *see also* Supp. App. 4a-8a discussing, *Yagman*; *Green*, and the other pertinent authorities presented in the petition.

[5] The Petition for Review *de novo* in paragraph 2 challenged that the findings

> are erroneous . . . for one or more of the following: * * * d. Rule 8.2(a), the First Amendment and the Indiana Constitution require that the lawyer knew that a statement was untrue, or had reckless disregard of its truth or falsity pursuant to a subjective culpability, but Respondent had a good faith belief that footnote 2 was an appropriate critique of the Opinion (*See* Brief . . . pp. 13-14 incorporated herein).

Supp. App. 14a.

The Commission also misstates that the burden of proof of falsity is an unraised question separate[6] from whether footnote 2 is protected speech as rhetorical hyperbole or opinion incapable of being proven untrue by the charger. The burden of proof of falsity is but a part of the First Amendment principle that rhetorical hyperbole or opinion is protected speech precisely *because* the charger cannot carry the burden of proof of *factual* falsity. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) ("Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). This is precisely the first question presented here which was raised initially in the trial brief,[7] then in the Petition for Review[8] and again in the Petition for Rehearing.[9]

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[6] The Commission begins by stating that "part of Wilkins' argument includes the claim that the . . . Commission had the burden of proving the actual falsity of the factual assertions in the footnote. Pet. at 6." Of course, there is no such argument in the Petition at p. 6 as cited. The burden of proof issue is a part of the issue that footnote 2 being rhetorical hyperbole or opinion is incapable of being proven untrue by the charger. Thereafter, as well as in the statement of the case, the Commission misstates, while Wilkins pursued the argument "that footnote 2 was protected speech because it was not provably true or false but Wilkins did not assert that the First Amendment demanded that the Disciplinary Commission bear the burden of proving falsity. . . ." (Brief, p. 8) And again, that Wilkins failed "to raise this First Amendment burden of proof claim at all in the state court. . . ." (Brief, p. 9). In the statement of the case, the Commission states: "Wilkins did not assert that the burden of proving falsity of the statements . . . fell on the Disciplinary Commission. Instead, his First Amendment claim focused on the contention that footnote 2 was protected speech because it was a statement of pure opinion. . . ." (Brief, p. 3); "In his petition for review and supporting brief, Wilkins, again did not argue that the First Amendment requires the Disciplinary Commission to shoulder the burden of proving the falsity of the statement as footnote 2." (Brief, p. 3).

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[7] Citing *Yagman* and *Green*, the trial brief specifically argued

> that statements impugning the integrity of the judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment. . . . The [*Yagman*] Court concluded 'thus, statements of rhetorical hyperbole aren't sanctionable, nor are statements that use language in a loose figurative sense'.

(Supp. App. 7a).

[8] The hearing officer's proposed findings were challenged as contrary to "Rule 8.2(a), the *New York Times* First Amendment standard . . . require that there be an untrue statement of fact that is capable of being proved true or untrue, which footnote 2 is not, but rather is an opinion. (*See* Brief in Support of Petition, pp. 10-12 incorporated herein)" where the petitioner further advanced this issue discussing *Milkovich*; *In re Green*; *Idaho Bar v. Topp*; and *Yagman*. (Supp. App. 14a).

[9] The Petition for Rehearing stated:

> The Per Curiam Opinion erred in failing to adopt the First Amendment *New York Times* standard and . . . it contravened the First Amendment *New York Times* standard by placing the burden of proof on respondent and . . . failed to give a First Amendment protection to an opinion which was incapable of being proven true or untrue. . . .

(Supp. App. 18a-20a).

II. *Assertion Of No Splits – Based On Misstatements And Semantic Sleights.*

The Commission's assertion that there is no split in authority among the lower courts – is again grounded in misstatements calculated to obfuscate or cover up the obvious multiple splits. The Indiana Supreme Court did not, as the Commission misstates, simply "decline . . . to entirely extend *New York Times* and its progeny." (Brief, p. 10) Rather, it ignored and rejected in total the *New York Times/Milkovich* standards, as have several other state high courts. (*See* Pet., pp. 12-13).

The Commission contends that state high courts "universally share the view that . . . [the lawyer's] standard *should not be identical* to the standard for ordinary citizen's speech" (Brief, p. 10). This is false [Pet. 11-16] and such a gross generality does not support the Commission's attempted conclusion that there is no split. Even among the state high courts' standards not identical to *New York Times*, there are splits on whether the *New York Times* standard should be rejected entirely, or only as to subjective malice, or how much less than identical the standards should be in the attorney disciplinary context. The Commission's gross generality and the asserted conclusion of no splits demonstrate the Commission's effort to hide the multiple splits, including:

1. those high courts which either ignore or expressly reject the *New York Times/Milkovich* standard in attorney discipline cases including Indiana, Iowa, Kansas, Kentucky, New York, Florida and Delaware[10] (*see* Pet., pp. 13-14);

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[10] *In re Wilkins I* and *In re Terry*, 394 N.E.2d 94, 95-96 (Ind. 1979); *In re Frerichs*, 228 N.E.2d 764, 766, 767 (Iowa 1976); *State v. Nelson*, 504 P.2d 211, 214-15 (Kan. 1972) and *In re Johnson*, 729 P.2d 1175, 1181 (Kan. 1986); *Kentucky Bar Assoc. v. Heleringer*, (Cont'd)

2. those state and federal courts which accept *New York Times* in part but reject the subjective actual malice standard for an objective standard;[11]
3. those state and federal courts which while rejecting the subjective malice standard accept *Milkovich*;[12]
4. those state high courts which accept subjective actual malice and *Milkovich*;[13] and
5. whether the burden of proving falsity is on the charger as the Ninth Circuit has held[14] or on the speaker to prove truth as *Wilkins I* and the Florida Supreme Court have held.[15]

Next, the Commission seeks to differentiate "in-court" from "out-of-court" lawyer speech cases – seeming to imply that this

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(Cont'd)

602 S.W.2d 165 (1980), *cert. den. sub. nom., Heleringer v. Bar Association*, 449 U.S. 1101 (1981); *In re Holtzman*, 577 N.E.2d 30, 32 (N.Y. 1991), *cert. den., sub. nom., Holtzman v. Grievance Committee for the Tenth Judicial Dist.*, 502 U.S. 1009 (1999); *Florida Bar v. Ray*, 797 So. 2d 556, 558 (Fla. 2001); *In re Shearin*, 765 A.2d 930, 938 (Del. 2000).

[11] *Idaho State Bar v. Topp*, 925 P.2d 1113, 1116 (Idaho 1996); *In re Westfall*, 808 S.W.2d 829, 837-38 (Mo. 1991); *In re Graham*, 453 N.E.2d 313, 322-23 (Minn. 1990); *United States District Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993); *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995).

[12] *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. 1974); *Yagman*, 55 F.3d at 1437-38; *Topp*, 925 P.2d at 1115-16.

[13] *In re Green*, 11 P.3d 1078, 1085 (Colo. 2000); *Oklahoma Bar Association v. Porter*, 766 P.2d 958, 968-69 (Okla. 1988).

[14] *Yagman*, 55 F.3d at 1441-42.

[15] *Ray*, 797 So. 2d at 1558-59.

accounts for the splits (Brief, pp. 11-12). While the Commission's factual observation is superficially accurate (with the caveat that some of the cases included both out-of and in-court statements), none of the "in-court" cases nor "out-of-court" cases seek to justify either the wholesale or partial rejection or adoption of the *New York Times/Milkovich* based on such distinction.[16] Most certainly the Indiana Supreme Court attempted no such justification for ignoring fully all or any part of *New York Times/Milkovich* standards. Indeed, many out-of-court cases and in-court cases rely on (or reject) each other — but not based on the distinction asserted by the Commission. Moreover, the cases which contain both types of statements make no distinction at all. *See*, *e.g.*, *In re Palmisano*, 70 F.3d 483, 485-86 (7th Cir. 1995). Finally, the in-court and out-of-court cases are intermixed among the four categories of split.[17] So separating the in-court from the out-of-court doesn't avoid the splits.

Having sought to dismiss the lawyer "out-of-court" statement cases, the Commission then seeks to establish no split within the "in-court" cases (Brief, pp. 11-12) again using the semantic sleight that they "uniformly apply a different standard" than *New York Times* to contend that no split exists. While inaccurate as to "uniformly", the conclusion of "no split" does not follow – even if all applied a "different" standard from *New York Times* – they split on how much different the standard should be, even as to total rejection as described above.

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[16] *Semaan*, for example, involved an attorney's letters to the editor of a newspaper which referred to a judge as a "midget among giants". The Court held the statement to be a protected expression of opinion, incapable of being proved true or false and thus subject to protection under *New York Times*. *Douglas* involved a lawyer's comments published in a newspaper to the effect that a judicial decision resulted from "political expediency" and "power jockeying". Once again, the State Supreme Court held such speech to be protected in the absence of "a serious and imminent threat to fairness and integrity of the judicial system. . . ." Once again, the result did not turn upon the out-of-court rather than in-court character of the statements.

[17] *Wilkins I* and *Frerichs* are in-court while Kentucky, Kansas and New York are out-of-court; *Topp* and *Yagman* are in-court while *Green* is out-of-court.

III. *The Rehearing 2-2 Split On The Merits Is Not The Indiana Court's Opinion.*

It is beyond dispute that the majority in *Wilkins I* (App. 1a-12a) wholly ignored *New York Times/Milkovich* and ignored that footnote 2 was but an opinion or rhetorical hyperbole critiquing an appellate decision as being result-based and in disregard of law and fact. This is undisputable on the face of the Per Curiam Opinion and indeed if there is anything implicit, it is that the Per Curiam thought footnote 2 was a matter of opinion and style.[18]

Wanting to contend that the Court "implicitly disagreed . . . that footnote 2 should enjoy the First Amendment protection afforded by *Milkovich*" (Brief, p. 16), and finding nothing on the face of the Per Curiam, the Commission turns to "Part I" of a two judge opinion on rehearing with two dissenters, *Wilkins IV*, App. 29a-30a, to support that the "Indiana Supreme Court" had "implicitly disagreed" with *Milkovich*. The Commission well knows that Part I of *Wilkins IV* by two judges with two dissenters is not the opinion of the "Court" on the First Amendment issues. In fact, the disqualifying justice made this certain by disqualifying before granting rehearing (rather than after, so as to cure the prior due process issue) – thereby locking in his vote as the third judge in the Per Curiam decision because the remaining four judges would split, as indeed they did, 2-2 thereby denying rehearing on the First Amendment issues (App. 16a-27a, decision on recusal, *Wilkins III* and App. 28a-32a denying rehearing on the merits in *Wilkins IV*.)

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[18] The majority implicitly indicated this stating: "We find that respondent's statements quoted above, although heavy-handed, roughly paraphrased the bases of transfer set forth in former Appellate Rule . . . the respondent's comments in footnote 2, however, are not even colorably appropriate." (App., 7a). The majority then found "that respondent offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for appellee, no matter what. Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission." (App., 9a).

IV. *Conclusion*

The Indiana Supreme Court Per Curiam decision totally ignored the First Amendment issues presented and convicted Petitioner, for the second time, of violating Rule 8.2(a) by challenging an appellate decision as being result-based, ignoring law and fact. The Indiana court did so over two dissents that such speech was protected by the First Amendment as rhetorical hyperbole or opinion incapable of being proven untrue by the charger or because subjective malice is required.

Indiana has joined a growing body of state high courts which elevate the importance of the judiciary over other branches by eliminating or restricting First Amendment protection for attorney advocacy critical of the judiciary under the banner of promoting confidence in the judiciary – but achieving the opposite. There are deep splits among the state high courts' application of First Amendment standards in this context. It is time for this Court to define the limits of the state high courts' powers regarding attorney speech in the course of advocacy under the First Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM RESPONDENT MICHAEL WILKINS' TRIAL BRIEF

THE SUPREME COURT
OF THE
STATE OF INDIANA

CAUSE NO. 49S00-0005-DI-341

IN THE MATTER OF:

MICHAEL A. WILKINS
Attorney No. 14368-02

RESPONDENT MICHAEL WILKINS' TRIAL BRIEF

Respondent, Michael A. Wilkins ("Mr. Wilkins"), by counsel, respectfully tenders his Trial Brief for the hearing in the above-captioned matter.

* * *

B. *Standard of Review*

* * *

In the case of *In Re Terry*, 394 N.E.2d 94 (Ind. 1979) *cert. den'd sub nom. Terry v. Indiana Supreme Court Disciplinary Comm'n*, 444 U.S. 1077, 100 S.Ct. 1025, 62 L.Ed.2d 759 (1980), the Court concluded that it would not require actual malice in analyzing charges of misconduct. In *Terry*, respondent, who had previously been suspended without pay as judge of the Ripley Circuit Court, was charged with making false accusations of a judicial conspiracy to cover up alleged criminal activity. However, in the more recent opinion of *In Re Atanga*, 636 N.E.2d 1253 (Ind. 1994), Justices Shepard and Sullivan dissented because of the severity of the sanctions imposed, with Justice Sullivan observing that the holding in *Terry* "may be ripe for re-examination in light of the exalted constitutional status given 'political speech' in Indiana by *Price v. State* (1993) Ind., 622 N.E.2d 954, ..." Mr. Wilkins contends that the charges in this case demonstrate that Indiana should indeed revisit the *Terry* opinion and afford attorneys greater constitutional protections in criticizing judicial opinions, if not the judiciary itself, as set forth below.

* * *

D. *The Language Involved Is Protected Speech Under Article I, §9 Of The Indiana Constitution And The First Amendment To The United States Constitution*

Article I, §9 of the Indiana Constitution provides:

> No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible.

In considering this constitutional protection, the Indiana Supreme Court has written:

> In protecting the freedom of speech and the press, the Indiana Constitution does not merely reiterate the language of the First Amendment. Rather, it

> both emphasizes the broad scope of the freedom and requires the responsibility for its abuse.

Journal Gazette Co., Inc. v. Bandido's, Inc., 712 N.E.2d 446, 486 (Ind. 1999).

The Supreme Court has also stated:

> At a minimum, the clause (Article I, §9) is implicated when the State imposes a direct and significant burden on a person's opportunity to speak his or her mind, in whatever manner the speaker deems most appropriate.

Whittington v. State, 669 N.E.2d 1363, 1368 (Ind. 1996).

Mr. Wilkins does not contend that Rule 8.2(a) is *per se* violative of the Indiana Constitution, but does contend that, as the Disciplinary Commission proposes to apply it in this case, it is unconstitutional in its application.

In *Price v. State*, 622 N.E.2d 954 (Ind. 1993), the Indiana Supreme Court offered an insightful assessment of the scope of Article I, §9 and overturned the appellant's conviction for disorderly conduct. The Court rejected an invitation to find the disorderly conduct statute overbroad or vague, in violation of the First and Fourteenth Amendments, and refused to apply the federal overbreadth analysis as to §9, but did find that the Appellant's rights to free speech trumped the disorderly conduct statute as applied under those circumstances. Mr. Wilkins asserts that the result should be the same in this instance.

Appendix A

In the case of *In Re Friedland*, 416 N.E.2d 433 (Ind. 1981), the Indiana Supreme Court addressed obviously outrageous conduct on the part of an attorney respondent in a disciplinary action who had been accused of attempting to influence public officials by threatening and publishing critical comments about the Disciplinary Commission. The Respondent argued that he was exercising constitutionally protected free speech and the ICLU filed an amicus brief arguing that:

> An individual does not relinquish its rights to petition the government to seek redress through the courts, or to oppose the practices of governmental agencies when admitted to the Bar of this State.

416 N.E.2d at 437.

The Supreme Court responded:

> This Court agrees with these propositions; however, we also recognize that such statements are not absolute in nature, but merely expressions of concern which must be measured in the context of competing social values.

Id.

The Court went on to state:

> This Court in the past has not addressed, specifically, the constitutional tension between the First Amendment and the Code of Professional Responsibility. Upon reflection of this question,

> it is our belief that a generalized test cannot be drawn. Each prohibition, circumscribed by the factual setting present in a particular case, must be examined in light of the affected State interest and measured against the limitation placed on the freedom of expression.

Id.

In this case, the factual setting, examined in light of the affected State interest (the integrity of the judiciary) and measured against the limitation placed on the freedom of expression in the context of advocacy, should lead to the conclusion that the language of Mr. Wilkins' Brief is not sanctionable *per se*, as a matter of law. We acknowledge that the Indiana Supreme Court has rejected a *New York Times Co.* standard (*New York Times Co. v. Sullivan*, 376 U.S. 254, 11 Ed.2dd 686, 84 S.Ct. 710 (1964) in *Terry*, *supra*, but clearly should, as Justice Sullivan has suggested, review the effect on advocates of too rigorous an application of Rule 8.2(a) to attorney speech, to which we would respectfully add *especially* where the speech is in the context of advocacy, as opposed to speech in an extra judicial context.

It is perhaps instructive to consider the Minnesota case of *In Re Graham*, 453 N.W.2d 313 (Minn. 1990), which contains a lengthy discussion of the balance between constitutional First Amendment rights and the interests of the Bar in enforcing Rule 8.2(a). The Minnesota Supreme Court cites *Terry* with approval, rejecting a purely subjective standard. Ultimately, the Minnesota Court held: "The standard must be an objective one, dependent upon what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Id.* at 837.

The Missouri Supreme Court in the case of *In Re Westfall*, 808 S.W.2d 829 (Mo. 1991), contains a survey of the law as of 1991 regarding free speech in attorney disciplinary cases. The majority cites *Terry* and *Graham*, *supra*, with approval, and reprimands the respondent, but the dissenting opinion by Chief Justice Blackmar is an excellent discussion of the law and argues for dismissal, ironically implying that the majority opinion is intellectually dishonest. Chief Justice Blackmar states at one point: "[P]ortions of the interview simply charge that the opinion is result-oriented. This assertion is frequently made about judicial opinions, and cannot be found to be a statement of fact." *Id.* at 842. Justice Blackmar cites a trilogy of 1940's vintage U.S. Supreme Court cases as to which he observed:

> The Court explained that the right of freedom of speech includes the right to criticize courts. The trilogy suggests that judges must have thick skins and do not require protection from criticism unless there is malicious defamation. First Amendment interests far outweigh a purpose of 'maintaining respect for the courts'.

Id. at 845.

The most frequently cited case containing a current analysis of the tension between the First Amendment and attorney disciplinary rules is *Standing Committee v. Yagman*, *55* F.3d

1430 (9th Cir. 1995).[14] Applying a "reasonable attorney" standard, rather than a *New York Times* subjective malice standard, the 9th Circuit found that Yagman's statements criticizing a judge did not violate prohibitions against attorneys impugning integrity of the court, nor the prohibitions against interfering with administration of justice, and reversed sanctions imposed by the U.S. District Court for the Central District of California. Yagman had urged application in the *New York Times* subjective malice standard, which the Circuit Court rejected, but it observed that statements impugning the integrity of the judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment, unless they "imply a false assertion of fact" and "even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target." *Id.* at 1439. The Court concluded "thus, statements of 'rhetorical hyperbole' aren't sanctionable, nor are statements that use language in a 'loose figurative sense'." *Id.*

The *Yagman* case includes a thorough discussion of "intellectually dishonest" rulings, finding respondent's

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[14] Yagman is described as an "outspoken civil rights lawyer" and was represented in the case by Ramsey Clark. Yagman was quoted as saying that a Central District of California Judge "has a penchant for sanctioning Jewish lawyers. . . . I find this to be evidence of anti-Semitism," and allegedly told a reporter that the same Judge was "drunk on the bench," although that accusation had not been published. In response to a publishers request for comments in connection with the same Judge, to quote the *Yagman* Opinion, "Yagman's response was less than complimentary." *Id.* at 1434. Mr. Yagman's opinion of the Judge is quoted in footnote 4 of the *Yagman* Opinion, and is indeed "less than complimentary."

"allegation of 'dishonesty' does not imply facts capable of objective verification [so that] it is constitutionally immune from sanctions." The opinion concludes with a quote from Justice Black in *Bridges v. California*, 314 U.S. 252 at 270-71, 86 L.Ed. 192, 62 S.Ct. 1990 at 197-98 (1941) (fn. omitted):

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, and all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect.

Yagman at 1445.

Most recently, the Colorado Supreme Court in *In Re Green*, 2000 Colo. Lexis 1034 (Colo. 2000), rejected a recommendation for suspension and determined public censure was a proper sanction for misconduct for charging an unreasonable fee. Importantly, however, it dismissed charges that respondent had violated Rule 8.4, adopting the *New York Times* test of actual malice in the context of disciplining attorneys for criticism of the judiciary. The attorney had written a letter to the judge stating: "Circumstances characterize you as a racist and bigot for racially stereotyping me as unable to be an attorney because I was black." The court found the respondent's speech protected by the First Amendment, cites *Yagman*, *supra*, and dismissed the Rule 8.4 charge.[15]

However unpersuasive the language at issue may have been, Mr. Wilkins' advocacy is entitled to the fundamental free speech protections of Article I, §9 of the Indiana Constitution and of the First Amendment to the United States Constitution. In this context — advocacy — the criticism of the Appellate Opinion should not be misinterpreted as if it was an attack on the integrity of the Court itself. To do so would violate Mr. Wilkins' constitutional rights and would have a chilling effect on advocacy in the State of Indiana.

IV. *CONCLUSION*

Mr. Wilkins contends that the language of which the Disciplinary Commission complains cannot be shown by clear and convincing evidence to have been either intentionally or recklessly false or an attack on the integrity of the Court of Appeals. The language only questioned the analysis which led the Court of Appeals to ignore certain facts and case law contrary to its conclusion. Mr. Wilkins' arguments were *bona fide* arguments predicated upon good faith advocacy, and were protected speech under Article I, §9 of the Indiana Constitution and the First Amendment to the United States Constitution. Mr. Wilkins does not contend that Rule 8.2(a) is *per se* violative of the Indiana Constitution, but with regard to the specific Disciplinary Commission charges against Mr. Wilkins in this case, is unconstitutional in its application. The better rule would cloak Mr. Wilkins' language with constitutional privilege as advocacy. Even if the hearing officer and the Supreme Court were not to adopt an advocacy privilege, the language at issue is so innocuous as to make any sanction completely unwarranted.

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[15] "The court found a "somewhat reduced governmental interest at stake in this context [a letter to the judge] than in the case of public comments to the press."

Respectfully submitted,

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APPENDIX B — RESPONDENT'S PETITION FOR REVIEW OF HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

IN THE
SUPREME COURT OF INDIANA

CASE NO. 49S00-0005-DI-341

IN THE MATTER OF:
MICHAEL A. WILKINS,
ATTORNEY NUMBER 14368-02

Respondent.

RESPONDENT'S PETITION FOR REVIEW OF HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Respondent, Michael A. Wilkins, by counsel, pursuant to Rule 23, Section 15, Indiana Rules for Admission to the Bar and the Discipline of Attorneys, respectfully petitions the Indiana Supreme Court for Review of the Findings of Fact, Conclusions of Law, and Recommendation (the "Findings") submitted by the Hearing Officer on April 30, 2002, and as grounds therefore states that:

1. The Findings and the charges by the Commission concern whether the Respondent violated Rule 8.2(a) of the Indiana Rules of Professional Conduct [hereinafter "Rule 8.2(a)"] by making a statement that he knew to be false, or with reckless disregard of its truth or falsity, concerning the

integrity or qualifications of a judge, more specifically the judges of the Court of Appeals, by stating in footnote 2 in the Brief in Support of the Petition to Transfer[1] as a part of the allegation that the Opinion had erroneously and materially misstated the Record and had not discussed the relevant cases that:

> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision). (Brief in Support . . . , n.2) Complaint ¶ 6).

2. The Findings are erroneous and not supported under the clear and convincing evidence standard in finding that

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[1] The Complaint contained three allegations that matter in the Petition to Transfer and Brief were in violation of Rule 8.2(a). The third charge was footnote 2 and the first and second charges, see Brief in Support of Petition for Review, p. 2, concern the allegations in the Petition to Transfer and Brief that the Opinion contained material misstatements of fact pursuant to the language of the former Appellate Rule 11(B)(f) which provided as a ground for transfer that "the Opinion . . . erroneously and materially misstates the Record. . . ." The Findings state at p. 11: "Respondent correctly asserts that two of the three statements made by Respondent in his 'Brief in Support of Appellant's Petition to Transfer' basically paraphrased the provisions of Indiana Appellate Rule 11(B). *See supra* Findings of Fact #6, #7; Joint Stipulation of Exhibits 2 and 3; Rules 11(B)(2)(c) and (f) of the Indiana Rules of Appellate Procedure) and such Hearing Officer finds that the Statements should not be used as bases for disciplinary action."

footnote 2 alleged "unethical conduct", impugned the integrity of the Court of Appeals, that footnote 2 "suggests unethical motivations" or in otherwise determining[2] that Respondent violated Rule 8.2(a), for one or more of the following:

a. Footnote 2 alluding to whether ("one is left to wonder whether") the Opinion was result-oriented or result-based — is a critique of the Opinion in a format used many times by the bench, bar and journals and was not meant, nor is it understood in the legal community, to charge the Court with unethical conduct or to attack the integrity of the Court. (*See* Brief in Support of Petition for Review, pp. 5-9, incorporated herein.)

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[2] The Hearing Officer determined that by a footnote 2, the Respondent "suggested that the judges of the Court of Appeals may have been motivated in their decision-making by something other than the proper administration of justice. . . ." [p. 13]; that the comment in footnote 2 was "unfounded and irresponsible" [p. 13]; that "Respondent, by tendering the language of footnote 2 . . . [made] a statement with reckless disregard as to its truth or falsity concerning the integrity of the judges of the Indiana Court of Appeals." [p. 13]; that footnote 2 "suggested that the Court of Appeals was motivated in its decision by considerations other than the administration of justice. Indeed, the footnote suggests unethical motivations." [p. 14]; "Respondent Wilkins alleged deliberately unethical conduct on the part of the Court of Appeals." [p. 15]; and that Respondent Wilkins by footnote 2 "violated Prof. Cond. R. 8.2(a) by making the statement with reckless disregard as to its truth or falsity concerning the integrity of the judges of the Court of Appeals." [p. 16].

b. The meaning of footnote 2 must be determined within the context of trade usage concerning specialized writing — here, the bench, bar and legal writers, and the intent of Respondent, a participant in such community.

c. Rule 8.2(a), the *New York Times* First Amendment standard as incorporated into Rule 8.2(a), and Art. I, Section 9 of the Indiana Constitution require that there be an untrue statement of fact that is capable of being proved true or untrue, which footnote 2 does not, but rather is an opinion. (*See* Brief in Support of Petition, pp. 10-12 incorporated herein.)

d. Rule 8.2(a), the First Amendment and the Indiana Constitution require that the lawyer knew that a statement was untrue, or had reckless disregard of its truth or falsity, pursuant to a subjective culpability, but Respondent had a good faith belief that footnote 2 was an appropriate critique of the Opinion. (*See* Brief in Support of Petition, pp. 13-14, incorporated herein.)

3. The Findings, at p. 14, which find "no constitutional violation in this case," are erroneous and contrary to law in that Rule 8.2(a), as applied to footnote 2 is unconstitutional, as applied to Mr. Wilkins' statements which were made in the context of advocacy for a client. Mr. Wilkins' advocacy constitutes protected speech under both Article I, Section 9, of the Indiana Constitution, and under the First Amendment to the United States Constitution.

4. The Findings are erroneous as a matter of law because the Indiana Supreme Court Disciplinary Commission failed to prove by clear and convincing evidence that Mr. Wilkins violated Rule 8.2(a).

5. The Findings are erroneous as a matter of law because the Hearing Officer failed to consider or erroneously excluded critical, uncontroverted evidence, while erroneously requiring that the Respondent prove "willful disregard of the facts or law by the Court of Appeals" (Findings at p. 15) in order to substantiate Respondent's reasonable argument and good faith belief that the Court of Appeals actually did "ignore" facts and law, all contrary to the Commission's burden of proof by clear and convincing evidence. Specifically, the Hearing Officer finds: "In other words, Respondent provides no evidence that the Court of Appeals ignored anything," (which is the Commission's burden) when in both his Trial Brief (Record, Tab 15, p. 14) and at the disciplinary hearing (Transcript, p. 47, l. 7 through p. 53, l. 15), Mr. Wilkins and counsel demonstrated his good faith belief as to such.

6. The Findings are erroneous as a matter of law and contrary to the evidence in that the Hearing Officer's Findings do not support the Conclusions of Law, particularly in that the Hearing Officer rejected paragraph No. 12 of the parties' Joint Stipulation that Mr. Wilkins is "genuinely and sincerely remorseful," a factor in mitigation, and erroneously re-characterized Mr. Wilkins' good faith defense of his advocacy and intentions as "Facts in Aggravation." Otherwise stated, paragraph 22 of the "Facts in Aggravation" portion of the Findings is contrary to the evidence (and paragraph 12 of the Joint Stipulation of Facts) and erroneous as a matter of

law in that the Hearing Officer erroneously misconstrued Respondent's reasonable "belief" in the substance of the argument advanced in the Brief in Support of Petition to Transfer as evidencing a lack of remorse, even though such positions are not inconsistent.

7. In the alternative, the Hearing Officer's "Recommendation" that the Respondent receive both a public reprimand *and* a thirty (30) day suspension from the practice of law is erroneous as a matter of law and contrary to the evidence. Such penalties would be greatly excessive in light of Mr. Wilkins' exemplary record as a lawyer, his lack of intent to attack the integrity of the Court of Appeals, the facts surrounding the alleged misconduct, his remorse, and other factors, especially when compared to prior cases involving violations of Rule 8.2(a) in which attorneys directly attacked the integrity and fitness of judges, in some cases implying criminal behavior. Assuming Mr. Wilkins has committed misconduct by including footnote 2 in the brief in support of Petition for Transfer, such behavior warrants, at most, a private reprimand.

WHEREFORE, the Respondent, Michael A. Wilkins, by counsel, respectfully: (1) petitions the Indiana Supreme Court for a review of the Findings of Fact, Conclusions of Law, and Recommendation submitted by the Hearing Officer on April 30, 2002; (2) requests a determination that Mr. Wilkins engaged in no misconduct; or, alternatively, requests a determination that any misconduct warrants either a private reprimand or no sanction at all; and (3) requests all other relief proper in the premises.

Respectfully submitted,

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APPENDIX C — EXCERPTS FROM MICHAEL A. WILKINS' PETITION FOR REHEARING IN THE SUPREME COURT OF INDIANA

Respondent petitions this Court (i) to rehear this case, (ii) after granting rehearing, to withdraw the Per Curiam Opinion; after (i) and (ii), Petitioner moves that (iii) Justice Rucker recuse himself, and (iv) the Court then find for Respondent.

This Court, in a 3-2 decision, determined that Respondent violated Rule 8.2(a) when in a footnote in a brief on transfer, he criticized the Court of Appeals' decision as being result-based ignoring law and fact. The Per Curiam Opinion is erroneous as hereinafter set forth.

ISSUES:

1. The Per Curiam Opinion erred in failing to adopt the First Amendment *New York Times* standard,[1] and
   (a) contravened the First Amendment *New York Times* standard by placing the burden of proof on Respondent, and
   (b) contravened the First Amendment-*New York Times* standard by failing to apply a subjective standard, and

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[1] The First Amendment restrictions apply to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Bridges v. California*, 314 U.S. 252, 268 (1939); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *New York Times Company v. Sullivan*, 376 U.S. 254, 276 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964).

(c) failed to give First Amendment protection to an opinion which was incapable of being proven true or untrue;

(d) contravened the First Amendment by determining that an attorney may only contest judicial conduct before the Judicial Qualifications Commission and not in proceedings where such conduct occurs.

2. Justice Rucker, being the object of a critique found to impugn his integrity and being a witness to the alleged result-based decision ignoring fact and law as a participant in the deliberations before and/or after the oral argument, was under a duty to disqualify himself, and having failed to do so and having participated in the Per Curiam decision, deprived Respondent of due process of law under the Fourteenth Amendment.

3. The Court denied Respondent his due process rights when it ordered an enhanced sanction because Respondent contested this matter through the procedures available under the Admission and Discipline Rules.

ARGUMENT:

1. ***First Amendment Errors.***

The Per Curiam Opinion makes it clear that the *New York Times* standard is not accepted. Rather, the Per Curiam opinion, while recognizing "the constitutional tension between the First Amendment and the Code of Professional Responsibility," rejects that any test can be drawn and adopts a case-by-case analysis that "each prohibition, circumscribed by the factual setting present in a particular case, must be examined in light of the affected State's interest and measured against the limitation placed on the freedom of expression." (Opinion p. 7 (adopting *In re Matter of Friedland*, 416 N.E.2d 433 (Ind. 1981))).[2]

Based on this elusive, unparticularized standard, contrary to U.S. Supreme Court precedent, the Per Curiam Opinion summarily finds that "preserving the public's confidence in the judicial system far outweighs any need for the respondent to air his unsubstantiated concerns in an improper forum for such statements." (Opinion p. 7). In doing so, the Per Curiam Opinion found that "the respondent offered no evidence to support his [Fn. 2] contentions" – and even "with such evidence, such statements *should be made only* to the Judicial Qualification Commission." (Opinion p. 7 (emphasis added)).

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[2] The Per Curiam Opinion failed to note, as Respondent urged, that Rule 8.2(a), which was adopted by this Court in 1987 after *Friedland, supra*, has been held to incorporate the *New York Times* standard. *See In re Green*, 11 P.3d 1078, 1084 (Colo. 2000) ("Indeed, Colo. RPC 8.2(a) incorporates the *New York Times* standard. . . ."); *In re Graham*, 453 N.W.2d 313, 321 (Minn. 1990) ("The language of Rule 8.2(a) . . . impliedly incorporates the [*New York Times*] standard").

It is respectfully submitted that this determination pays little heed to First Amendment requirements and, in fact, directly conflicts with the First Amendment *New York Times* standard which was set forth in Respondent's Brief, pp. 10-14. Respondent urged the Court to take note of Justice Sullivan's dissent over eight years ago in *In re Atanga*, 636 N.E.2d 1253, 1259 (Ind. 1994), that Rule 8.2(a)[3] adopts the *New York Times* standard.[4] Respondent further urged that this Court should follow the other courts, including the Supreme Courts of Colorado, Minnesota, Delaware and Iowa, and the Ninth Circuit Court of Appeals,[5] which have applied the First Amendment *New York Times* standard to attorney criticism of judges and courts, the correctness of which is beyond doubt under the Supreme Court precedent.[6]

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[3] *Id.*

[4] Justice Sullivan stated: In view of the "exulted constitutional status given 'political speech' in Indiana by *Price v. State*, (1993), Ind., 622 N.E.2d 954. . . . Terry might be ripe for reexamination." 636 N.E.2d at 1259. After *Terry*, this Court recognized the necessity for considering the "constitutional tension between the First Amendment and the Code of Professional Responsibility. . . ," and has chosen to consider the affected State interest measured against the limitation placed upon freedom of expression on a case by case basis. *In re Friedland*, 416 N.E.2d 433, 437 (Ind. 1981).

[5] *See In re Green*, 11 P.3d 1078, 1084 (Colo. 2000) ("Indeed, Colo. RPC 8.2(a) incorporates the *New York Times* standard. . . ."); *In re Shearin*, 765 A.2d 930 (Del. 2000); *In re Ronwin*, 557 N.W.2d 515 (Iowa 1997); *In re Graham*, 453 N.W.2d 313, 321 (Minn. 1990) ("The language of Rule 8.2(a) impliedly incorporates the [*New York Times*] standard"); *Standing Committee on Discipline, U.S. District Court v. Yagman*, 55 F.3d 1430 (9th Cir. 1955); *United States Dist. Ct. v. Sandlin*, 12 F.3d 861 (9th Cir. 1993).

The Per Curiam Opinion does not address the issues and authorities that Respondent urged,[7] or Justice Sullivan's suggestion of the need for reexamining this Court's precedent, or the dissents of Justices Sullivan and Boehm in this case.

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[6] The Rules of Professional Conduct are subject to the strictures of the First Amendment. *See Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1995); *Gentile v. Nevada Bar Association*, 501 U.S. 1030 (1996). *Garrison*, *supra*, makes it clear that attorney's criticism of the judiciary even though false, is protected by "the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing and reckless falsehoods. 379 U.S. at 73. The disallowance to a public official of a civil remedy against criticism even if false "apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. . . ." *Id. New York Times* was in fact largely based on the analogy to the Court's previous holdings "that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt criticism of the judge or his decision . . . even though the utterance contain 'half truths' and 'misinformation' . . . surely the same must be true of the other government officials, such as elected city commissioners." 376 U.S. at 721.

[7] The Per Curiam Opinion states that Respondent "provides no authority specifically illustrating why or how his statements are protected by State or Federal constitutional provisions." (Opinion pp. 5-6). However, Respondent respectfully urges the Court to reexamine Respondent's Brief, pp. 10-14 and the applicable case law from all of the various jurisdictions which have determined that the *New York Times* standard is in fact applicable to an attorney's criticism of a judge or a court which is outside the bounds of direct contempt and further that the *New York Times* standard has been accepted and adopted in Rule 8.2(a).

This fundamental error, in failing to examine, much less adopt, the First Amendment *New York Times* standard, led the Per Curiam Opinion into further error. An integral component of the *New York Times* standard (not to mention this Court's disciplinary rule) is that the attacker of speech, here the Disciplinary Commission, carries the burden to prove both that the speech is not true and that the speaker had actual knowledge or reckless disregard of the falsity of the speech. *See Idaho State Bar v. Topp*, *supra*, ("[W]e conclude that ISB has established for the purposes of this case, that Topps' statements as to Judge Michaud's motives were false. The parties stipulated that [the judge] would testify that his decision in the judicial confirmation proceeding was not politically motivated. . . ." 925 P.2d at 1121). There is no such evidence in the case at bar. To the contrary, the Per Curiam Opinion placed the burden of proof on Respondent. (Opinion p. 6-7) ("[W]e find that Respondent offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for appellee, no matter what. Without evidence, such statements should not be made anywhere."). This is in direct contravention of the First Amendment *New York Times* standard.

Further, the Per Curiam Opinion contravenes the First Amendment by determining that even if the charges were true, Respondent must confine such charges to the Judicial Qualifications Commission. Not only is such holding contrary to fundamental First Amendment precepts, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829

(1978) (First Amendment bars criminal punishment of persons for divulging truthful misconduct information regarding judges as neither the reputation of a judge nor judicial integrity are sufficient to justify punishment of speech), but it directly limits Respondent's ability to protect his client's interests.

Finally, the Per Curiam Opinion further errs under the First Amendment *New York Times* standard by ignoring that Footnote 2 was but an expression of an opinion not capable of being proven true or false and therefore protected by the First Amendment. Again, Respondent specifically advanced this question of law to the Court and again the Per Curiam Opinion failed to discuss or give any reason for rejecting such First Amendment principles or for failing to adopt the dissent of Justice Sullivan in *In re Atanga*, *supra*, in this regard.

Judicial reputation is insufficient reason "for repressing speech that would otherwise be free" while the "institutional reputation of the courts, is entitled to no greater weight on the constitutional scales than another institution." *Landmark Communications*, 435 U.S. at 844. Justice Black observed, much as did Justice Boehm here, that "the assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly apprises the character of American public opinion . . . [E]nforced silence, however limited, solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion and contempt, much more than it would enhance respect."

Bridges v. California, 314 U.S. at 270-271.[8] This prediction seems to have come true in the case at bar. *See* Ex. 1 -6, attached hereto.

Conclusion/Relief. The Per Curiam Opinion's refusal to apply the First Amendment *New York Times* standard, error in itself, led the Court into multiple fundamental errors which stripped Respondent of any First Amendment rights and improperly cast the burden of proof on Respondent in contravention of both First Amendment principles and the disciplinary rules of this Court. This Court should grant rehearing, withdraw the opinion, after which, as set forth below, Justice Rucker should recuse himself. The Court should then reconsider this case anew in light of the First Amendment *New York Times* standard with the burden of proof properly cast.

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8. Or as put by Justice Frankfurter in dissent — speech cannot be punished "to protect the court as a mystical entity or the judges as individuals as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed."